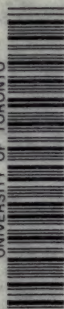


UNIVERSITY OF TORONTO



3 1761 01160395 8

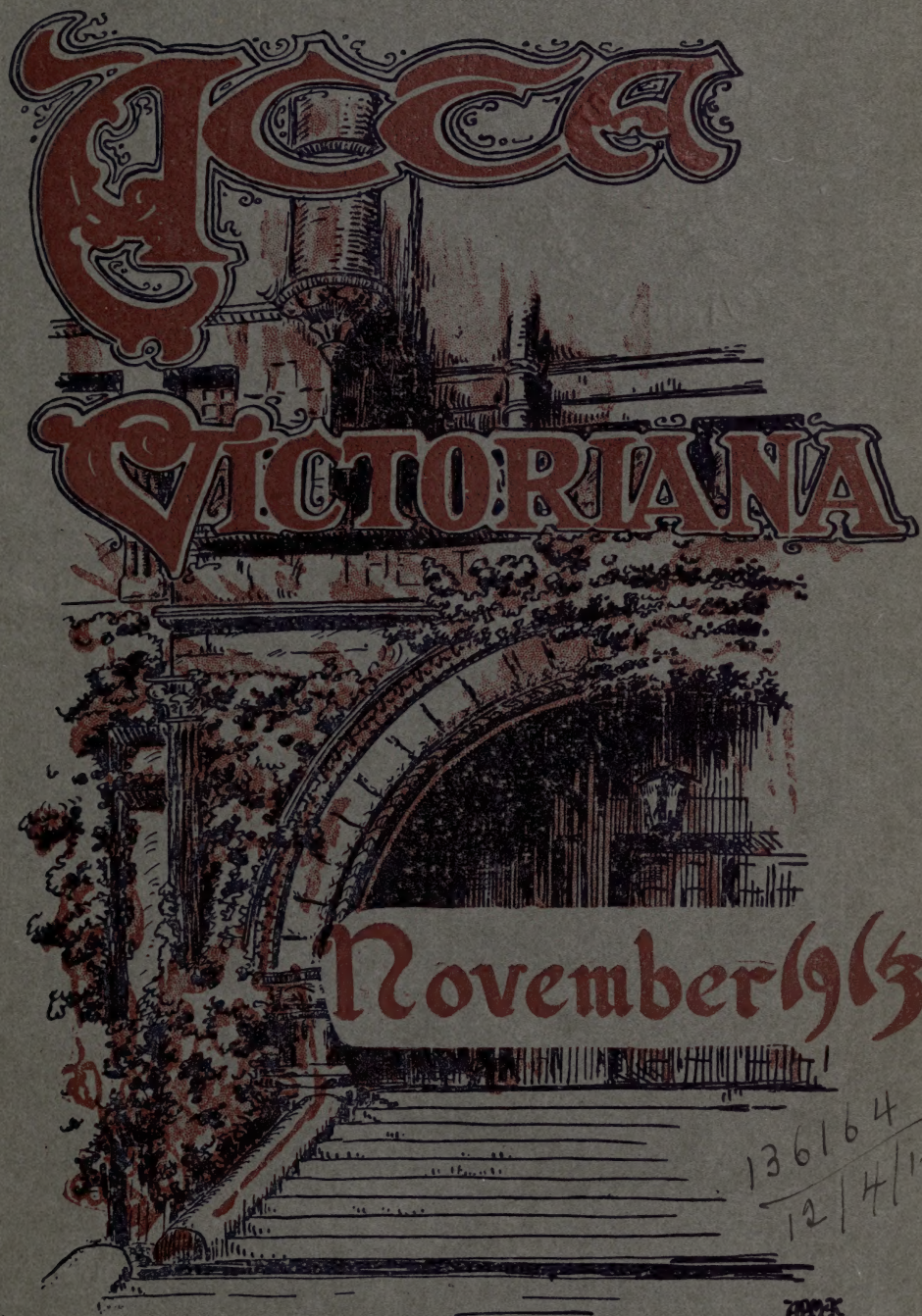
PRESENTED
TO
THE UNIVERSITY OF TORONTO

BY
*The Honorable
Mr. Justice Riddell
Toronto*

ch
the Author
8/4/15

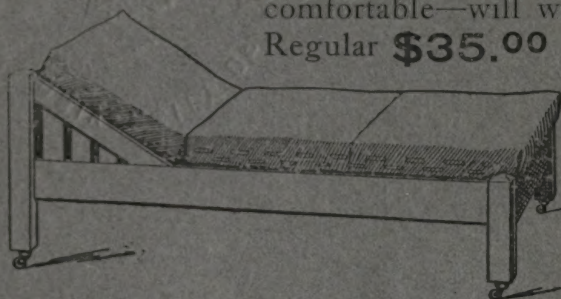


Digitized by the Internet Archive
in 2007 with funding from
Microsoft Corporation



It Looks Good---But It Feels Better

This splendid couch in Mission or Fumed Oak. The cushions are of real leather, it is strong and very comfortable---will wear a lifetime.



Regular \$35.00 for \$28.50

We have
couches
from

\$3.75
up.

The Dale Furniture Company

304½-308 YONGE STREET

--

TORONTO

HON. GEO. A. COX,
President

E. R. WOOD, G. A. MORROW,
Man. Director, Asst. Manager

Capital Subscribed	\$2,500,000
Capital Paid Up	1,750,000
Reserve Fund	1,650,000
Total Assets	9,868,000
Surplus Over all Liabilities to the Public	4,226,000

*Deposits received and
Debentures issued*

**CENTRAL
CANADA**

LOAN & SAVINGS COMPANY
26 King Street East, TORONTO

EDEN SMITH & SONS

Architects

199 Yonge St.

Toronto.

SENIOR BROS.

TAILORS
AND
GOWN
MAKERS

768 Yonge Street
Toronto

Our Graduates' Welcome to President Bowles

BY THE HONOURABLE WILLIAM RENWICK RIDDELL,

Justice of the Supreme Court of Ontario.

I am highly privileged in being permitted to speak for the graduates of Victoria University in an address of welcome. I cannot but think that there is something eminently fitting in the selection of a non-Methodist for that function; for, long before the corner-stone of the Upper Canada Academy was laid in the old and historic town of Cobourg by Dr. John Gilchrist on that beautiful day in June, 1832, it had been decided once for all that in the seminary of learning there to be built should be reserved no peculiar privileges for any religious body—none reserved even for the children of its founders. The Upper Canada Academy was not a sectarian institution; and the title of "Missionary College" was repudiated with scorn when that term implied a proselyting warfare upon other Churches. Every Methodist minister—even though on probation—was asked to contribute five dollars to its funds; and that when five dollars meant much more than fifty would at the present time. The Methodists built, equipped, manned and supported the Academy; but its doors were open to those of all creeds and to those of none; and no student was ever asked to take part in a religious instruction of which his parent or guardian did not approve.

As the Methodist Church itself was founded in protest against sin alone, so the Methodist Academy was founded in protest against ignorance alone. Its founders reasoned that as total ignorance is a bad and a dangerous thing, so every degree of knowledge lessens both the evil and the danger.

Nor was patriotism forgotten. It is a singular and unfortunate fact that never since the very first year of Upper Canada's separate provincial existence have there been wanting charges of disloyalty against some class of her people; and the troublous times of the third and fourth decades of the last century furnished no exception. In some instances the charge was but too well deserved; but the Upper Canada Academy was founded explicitly in the hope and expectation

that her training would keep her students loyal (more loyal they could not be). It was claimed that "an educated people are always a loyal people to a good government. An ignorant population are equally fit for and are liable to be the slaves of despots and the dupes of demagogues; sometimes, like the unsettled ocean, they can be thrown into uncontrollable agitation by every wind that blows; at other times, like the uncomplaining ass, they tamely submit to the most unconscionable burdens."

Founded in the interests of sound non-sectarian learning and of discriminating patriotism, the Academy pursued its beneficent course from the day of its opening in 1836 until five years later it became Victoria University.

Thenceforward, as a University College, she never lost sight of her high purpose. Roman Catholic, Anglican, Presbyterian—all were as welcome and were as well received in her classrooms as was the Methodist; and this continued even after other religious bodies had instituted colleges of their own, and it continues to this day. In Victoria, none was the son of the bondwoman who should not be heir with the son of the freewoman, but all were brethren: if her first graduate was a Methodist, her second was a Presbyterian.

Of the success of Alma Mater in imparting information, of the thoroughness of her teaching, I do not speak—the success of her sons is the best evidence. The devotion of her graduates, their deep, heartfelt loyalty to their land and their institutions, no one questions, even tacitly. How far she has succeeded in the task originally assumed, the whole country knows; how far she has succeeded in binding her sons to their Alma Mater requires no witness. *Si monumentum requiris, circumspice.*

To the presidency of an institution the oldest of its class in our Province, dear to the heart of her hundreds of graduates, I welcome you in the name of these graduates. I welcome you to the chair once filled by Dr. Egerton Ryerson, the splendid debater, the ardent lover of freedom and justice, one devoted to the cause of education, whose dignity as a gentleman was only excelled by his worth as a man, his humility as a Christian. They were indeed not many in number who in 1842 and the two succeeding years passed out to the work of life under the virile hand of Dr. Ryerson; but his influence is not yet dead, either in Victoria's halls or in the larger world of the Province

and the Dominion. Thousands and tens of thousands may rise up and call him blessed; for without him there would not so soon have been the free school.

I welcome you to the chair of Dr. Samuel S. Nelles, the acute metaphysician, the widely read scholar, the gentle satirist, the kindly and loving father to all his troubled students—"for life is thorny and youth is vain."

*"His saltem accumulem donis, et fungar inani
Munere"*

for

*"Quis desiderio sit pudor aut modus
Tam cari capitis?"*

I welcome you to the chair of Dr. Nathaniel Burwash—to many, a Nestor (*eheu fugaces labuntur anni*), to me, an elder brother—not inferior to either predecessor in learning, in character, in Christian worth, in loving and wide-reaching sympathy—and perhaps excelling both in that sweet reasonableness and regard for the opinions and feelings—aye, even the prejudices—of others, which make for great statesmanship; that serene optimism which so often accomplishes what it hopes for:

*"Spes bona dat vires, animum quoque spes bona firmat
Vivere spe vidi qui moriturus erat."*

— That he may long be spared to aid Victoria and Victorians with wise counsel and brotherly communion is the heartfelt prayer of all who know his worth, though they may not have met him face to face or grasped his friendly hand.

To this chair I welcome you in the name of all the children of Alma Mater, from Oliver Springer of 1846 and William Ormiston of 1848, to the last on the class list of 1913. Some, many, have passed away; but if the faith of some of us be not wholly unfounded, what is done here will be neither unknown nor a matter of indifference to those who have passed over.

Howbeit, the splendid beadroll of living graduates, the missionary in distant China and India—for Victoria is a "Missionary College" in a much nobler and higher sense than was

even thought of in the early thirties—the leader in Church and State, the judge on the bench, the practising lawyer and physician, the farmer and the merchant, the native-born and the Japanese, the resident of Canada and he who has made his way to foreign lands to fight the fight of life—and that grand legion whom it is the convention to call “sweet girl graduates with their golden hair,” but of whom I prefer to think and to speak, and who themselves prefer to be regarded, as thoroughly educated, high-principled, serious-minded women, able and willing to do their share in the world’s work—all who in any land, of any race, creed or condition, glory in the name of Victoria, welcome you through my voice to the chair so worthily filled by your distinguished predecessors.

And we expect much of you. The weary campaign for religious and political equality and justice through which passed Dr. Ryerson, the disheartening struggle for adequate moral and pecuniary support which saddened the life of Dr. Nelles (so far as that sunny life could be saddened thereby), the difficulties in respect of Victoria’s true place in Federation and in the development of harmonious co-operation, involving the reconciliation of ancient—and new—jealousies and misunderstandings, are all of the past.

But there are new difficulties, and there will always be new difficulties. Never again in Ontario can there be a claim by any one Church to control higher education or to be alone entitled to recognition by the State; but there may be a claim by some that only they hold the faith which was once delivered unto the saints, and that others whose point of view is a little—or it may be a great deal—different from theirs, have left their first love—there may be the scientist convinced beyond controversy of the soundness of his own theories and conclusions, who may charge, honestly charge, with intellectual dishonesty and tergiversation another who does not concur in his views. It may require as much moral courage as Dr. Ryerson ever displayed throughout his great career to set your face like a flint against proscription of a truth because it is new and against persecution of him who utters it.

And while the day of small things is past with Victoria, and there is no lukewarmness in the feeling of the great Methodist Church towards her, no college worth its salt ever had or ever

will have enough money—you will all your life have to exercise ingenuity in making one dollar do the work of two, one man do the work of half a dozen.

The place of Victoria in Federation is settled; the sons of Victoria, even those of us who long and consistently opposed the scheme, are loyal to the University of Toronto. Without any mental reservation, we claim the University of Toronto as *alma mater*, not as *noverca saeva*. But there will be other difficulties, difficulties of co-operation, co-adaptation, co-ordination, inter-collegiate difficulties, to be overcome; perhaps inter-collegiate, certainly collegiate, jealousies and discords to smooth over and reconcile. The day of the prudent negotiator and careful adjuster will never be over.

We know that the successor of a Ryerson, a Nelles, and especially of a Burwash, has no easy task; yet those of us who know of your past are wholly confident that, measured even with these illustrious men, you will be no failure—that at the end of your service, as of theirs, there will be the commendation “Well done, good and faithful servant.”

In the name and on behalf of the graduates I welcome you as President and Chancellor of Victoria University.



Two Sonnets

I.

PROFUNDITY.

Dedication: To any Philosopher or J. D. R.

I found him juggling at his cottage door
 With Freedom and with Fate; he worked it out:
 This way it's Fate, this, Freedom put to rout.
 He marshalled all the philosophic lore
 He'd pressed from books. This way it's Fate, and that,
 And that—well, 'twas not just as plain as he
 Would have it plain. Could some man only see
 It once, 'twould be as plain as his door mat!

This way it's Fate. . . . The sun and moon and stars
 Are fated . . . earth's order; chaos, no less,
 Would be were't otherwise. With sudden stress
 He rose. "All's Fate!" he cried. The pasture bars
 Were down. "Say, plague that pesky turnip-head,
 Hired help! I'll make him change his ways!" he said.

II.

LINES BY A POLITICAL SCIENCE MAN.

Dedication: To the Com. of 40 or any 18 Carat Theolog.

By what criterion do you judge me base?
 I may be villainous; you state me so.
 By the indictment of your spleen I grow
 Worse rogue each day; you quite make out a case.
 But am I villainous? By what great test
 Do you outrule me, prove me dog unhung?
 You damn me straight. I say: But no, I've clung
 To more morality than you have guessed.

For see; you have a little rule you say:
 Does he do so? he's blest. If otherwise
 He's counted out, no reason, no replies;
 He's out; he's cast his own great soul away.
 By what criterion do you cast your ban?
 You're dumb! I knew. Life 'scapes your petty scan!

BENEFICIO.

Victoria University

Seventy-Seventh Charter Day

Friday, October 17th, 1913

Convocation Hall

University of Toronto

Inauguration

OF

Rev. Richard Pinch Bowles, M.A., D.D., LL.D.

AS

President and Chancellor

Rev. A. Carman, M.A., D.D.

GENERAL SUPERINTENDENT

Presiding

Doxology

Invocation

Scripture Reading

REV. F. H. WALLACE, M.A., D.D.
Dean of the Faculty of Theology

Prayer

REV. J. W. GRAHAM, B.A., D.D.

Hymn

Unto the hills around do I lift up
My longing eyes,
Oh whence for me shall my salvation
come,
From whence arise?
From God the Lord doth come my
certain aid,
From God the Lord, who heaven and
earth hath made.

He will not suffer that thy foot be
moved:
Safe shalt thou be.
No careless slumber shall his eyelids
close,
Who keepeth thee.
Behold, he sleepeth not, he slumbereth
ne'er,
Who keepeth Israel in his holy care.

Jehovah is himself thy keeper true;
Thy changeless shade;
Jehovah evermore on thy right hand
Himself hath made.
And thee no sun by day shall ever
smite,
No moon shall harm thee in the silent
night.

From every evil shall he keep thy soul,
From every sin:
Jehovah shall preserve thy going out,
Thy coming in.
Above thee watching, he whom we
adore
Shall keep thee henceforth, yea, for
evermore.

Announcement of Medals, Scholarships, Prizes

PROFESSOR J. C. ROBERTSON, M.A.
Dean of the Faculty of Arts

Addresses

REV. S. D. CHOWN, D.D.
General Superintendent

REV. N. BURWASH, S.T.D., LL.D., F.R.S.C.
President Emeritus

MR. JUSTICE MACLAREN, M.A., LL.D.
Vice-Chancellor

Inaugural Address

REV. R. P. BOWLES, M.A., D.D., LL.D.
President and Chancellor

Addresses

THE STUDENTS

PRESIDENT R. A. FALCONER, M.A., LL.D., C.M.G.
For the University

MR. JUSTICE RIDDELL, B.A., B.Sc., LL.D.
For the Graduates

MR. N. W. ROWELL, K.C., M.P.P.
For the Methodist Church

Benediction

Graduates in the Faculty of Arts, 1913.

Masters of Arts

A. E. Allin, B.A., 1910.	J. L. Guinn, B.A., 1909.
F. C. Asbury, B.A., 1911.	Harold Holgate, B.A., 1912.
Nestore Cacciapuoti.	G. E. Reaman, B.A., 1911.
W. A. Clemens, B.A., 1912.	H. O. Rogers, B.A., 1911.
R. C. Coatsworth, B.A., 1910.	F. N. Stapleford, B.A., 1912.
W. F. Dixon, B.A., 1912.	W. B. Wiegand, B.A., 1912.
W. C. Graham, B.A., 1912.	A. G. Young, B.A., 1912.

Bachelors of Arts

F. Ainsworth.	Miss M. M. Colbeck.
Miss R. Allison.	Miss A. L. Cook.
G. W. Armstrong.	W. Coutts.
A. D. Banting.	L. C. Cox.
W. W. Barraclough.	G. A. Coyne.
K. J. Beaton.	Miss A. W. Crawforth.
R. T. Birks.	Miss B. M. Crawforth.
Miss F. M. Blatchford.	Miss G. Cruikshank.
C. G. Brown.	Miss M. L. Cuthbertson.
P. B. Brown.	W. A. Davidson.
F. G. Buchanan.	G. A. Davis.
Miss W. Bunting.	J. C. Dempster.
Miss J. Burns.	S. G. Devitt.
H. C. Burwash.	W. E. Donnelly.
Miss M. L. Burwash.	Miss L. I. Douglas.
Miss I. E. Clemens.	R. B. Duggan.
Miss J. M. Clement.	Miss C. M. Eakins.
Miss E. E. Cloke.	Miss R. M. Evans.

Miss I. M. Finch.
Miss F. M. Flanagan.
H. M. Ford.
H. G. Forster.
H. A. Frost.
J. R. Fryer.
R. J. P. Gauley.
Miss E. I. Gilroy.
E. J. Glover.
H. J. Goodyear.
F. T. Graham.
T. E. Greer.
G. L. Haggen.
A. C. Hazen.
Miss E. M. Henderson.
A. B. Holmes.
Miss M. Holmes.
Miss T. E. Hutton.
W. E. W. Hutton.
W. F. Huycke.
N. J. Ireland.
H. C. Jeffries.
J. W. F. Kerr.
Miss M. B. Kettlewell.
J. Line.
W. J. Little.
L. G. McAndless.
Miss B. McCamus.

J. G. McKee.
A. P. McKenzie.
Miss E. H. Matthews.
Miss A. Merritt.
W. J. Mumford.
N. L. Murch.
Miss R. K. Neff.
Miss I. M. Oldham.
Miss M. F. Owen.
J. R. Peters.
A. L. Phelps.
Miss W. E. Phelps.
J. D. Robins.
W. E. Sloan.
A. L. Smith.
J. R. Smith.
Miss L. Snider.
Miss R. E. Spence.
J. W. Stewart.
J. J. Stillwell.
J. H. Stoneman.
N. O. Thomas.
C. H. Warriner.
T. D. Wheeler.
Miss V. L. Whitney.
Miss B. H. Wilson.
A. M. Wise.

Medals, Scholarships and Prizes, 1913.

FOURTH YEAR.

The Prince of Wales Gold Medal (1st in General Proficiency)		No award.
The Prince of Wales Silver Medal (2nd in General Proficiency)		No award.
The Governor-General's Silver Medal (1st in Honour English)		A. L. Smith ranked for this. No award.
The Edward Wilson Gold Medal (Orientals)		W. J. Mumford.
The S. H. Janes Silver Medal (Classics)		No award.
The J. J. Maclaren Gold Medal (Moderns)		Miss V. L. Whitney.
The S. H. Janes Silver Medal (Moderns)		Miss L. I. Douglas.
Gold Medal (English and History—Moderns)		J. D. Robins.
The E. J. Sanford Gold Medal (Philosophy)		J. Line.
The S. H. Janes Silver Medal (Philosophy)		A. L. Smith.
The Silver Medal (Mathematics and Physics)		Miss R. M. Evans.
The George A. Cox Gold Medal (Natural Science)		W. W. Barraclough.
The S. H. Janes Silver Medals (Natural Science)		{ A. C. Hazen. J. R. Smith. } aeq.
The W. J. Robertson Prize (Can. Const. Hist.)		H. C. Jeffries.

THIRD YEAR.

The Bell Scholarship (Classics)	. . .	H. G. Robertson.
The Class of 1893 Bursary	. . .	E. D. Beynon.
The Hodgins Prize (1st in Pass English)	. . .	L. S. Albright.

SECOND YEAR.

The Classical Scholarship (Classics) . . . H. Bennett.
The Webster Prize (1st in Pass English) . . . L. G. Hutton.
The Robert Johnston Prize (1st in Pass Hebrew) L. G. Hutton.

FIRST AND SECOND YEARS.

Regents' Prizes (1st and 2nd English Essays) . { Miss E. M. Granger. } aeq.
P. A. W. Wallace. }

FIRST YEAR.

The Robertson Scholarship (Classics) . . . No award.
The Class of 1902 Prize (1st in Pass English) . . . E. F. Church.

JUNIOR MATRICULATION, 1913.

The Martha Bell Scholarship } (Classics) { G. M. Huycke. } aeq.
The Flavelle Scholarship . } { W. W. Whittaker. }
The W. E. H. Massey Scholarship (Classics) . . . W. G. Hardy.

Medal and Scholarships

Awarded by the Senate of the University of Toronto to the Students of
Victoria College.

FIRST YEAR.

The Bankers' Scholarship L. W. Moffit.
The Alexander T. Fulton Scholarships . . . 2. R. M. Taylor.

SECOND YEAR.

The Edward Blake Scholarship in Physics . . . A. C. Lewis.
The John Macdonald Scholarship in Philosophy L. G. Hutton.

THIRD YEAR.

The Daniel Wilson Scholarship in Biology . . . H. B. Sifton.
The Alexander Mackenzie Scholarships in
Political Science 2. W. M. Smith.

FOURTH YEAR.

Governor-General's Gold Medal A. L. Smith.
"Industrial Canada" Prizes 1. W. J. Little.

Insanity in Its Legal Aspects

BY

The Hon. William Renwick Riddell,
L.H.D., etc.

Justice, King's Bench Division,
H. C. of J., Ontario.



REPRINTED FROM JANUARY NUMBER OF THE BULLETIN
OF THE ONTARIO HOSPITALS FOR THE INSANE.

(Printed by order of the Legislative Assembly.)

Insanity in Its Legal Aspects

BY

The Honourable William Renwick Riddell, L.H.D., Etc.

Justice, King's Bench Division, H. C. of J., Ontario.

A Word with Alienists.

Early one morning a doctor and a policeman going along the street found a man lying opposite a store. Enquiry soon disclosed that he had a broken leg. To the medical man, the sufferer at once became the patient, but to the policeman, he remained only a possible burglar. To the doctor, it made no difference whether the man was the most hardened criminal in the world; his art and science are wholly at the disposal of a Bill Sykes as of a Seth Pecksniff or a Ned Cheeryble. To the policeman, it made no difference whether the stranger had one broken bone or fifty, whether there could be a cure without shortening or whether he could ever expect to walk with ease again. What the policeman was concerned with was, "had the man been breaking the law? and, if so, what was the available evidence?"

They both took part in conveying him to the hospital, the doctor that there might be a better chance of perfect recovery, the policeman that he might the better know where to put his hand upon the suspected. Had a clergyman happened along, he would probably have been anxious about the poor man's spiritual condition and the salvation of his soul; these to the physician were only of importance as they bore upon the treatment and prognosis (and that would be almost if not quite infinitesimal), while the policeman, as policeman, would care nothing about it at all, and would not be inquisitive even as to whether the

man had a soul at all, and, if so, whether it was worth saving or trying to save. Now, none of these viewpoints is higher than either of the others, but all are radically different.

It is from not bearing in mind the different aspects from which the same facts are to be and are considered, that there is so much disputing about the insane; so much time wasted in the courts over expert testimony, and so much contempt expressed by the lawyer for the medical expert on insanity, only equalled by the contempt of many a medical expert for the rules of law in that respect.

If it should happen that a judge were called in by a medical man to assist in the treatment of an insane man, he would necessarily follow out the methods of medical treatment. And so, where a medical man is called upon to assist in the administration of the law, he must adapt himself for that occasion to the principles of the law. Neither judge nor lawyer need, while assisting in the province of the other, abandon the views he holds in his own province—nor does he. To the medical man, the insane person is a sick man to be treated for his disease, and it is a matter of indifference whether he is a criminal or not; to the judge, it is a matter of indifference whether a prisoner or a litigant be insane or not, the question is, is he capable of making a contract? is he responsible for his acts?

One more thing before attacking our main theme—the judge does not make the law; that is either a matter of tradition or of legislation, in either case of binding authority. He cannot change or avoid the law—for which he is no more responsible than the doctor is for the insanity of a patient or for the laws of nature governing insanity. And this law is binding upon all citizens, and all good citizens should obey the law in this as in all else. If the law does not suit the doctor or any other person, he may do his best to have it changed by Parliament; but it is the bounden duty of every one to obey the law so long as it is law,

As most of the instances in which medical men come in contact with the law are cases of insanity, real or alleged, I have thought it not without advantage to deal with the law in respect of insanity so far as medical men are likely to be affected.

Sometimes a doctor is called upon to examine one alleged to be insane, in order that he may be committed or declared by the courts to be insane. The opinion of a medical man is considered by a Court practically worthless if given simply as an opinion. The Court determines the question of insanity, and requires the medical witness to set out in his evidence, affidavit or otherwise, in full, his reasons for his conclusions. Care should be taken to preserve and transmit all conversation (if any) and all other indicia from which the practitioner has formed his judgment.

Again—and this is the most frequent case—a medical man is called as a witness in court upon the question of insanity. He may be an ordinary, though skilled, witness to set out the facts of the condition of the person whose mental state is under investigation, or he may be an expert witness called simply to give an opinion, or he may act in each capacity.

A witness should always bear in mind that he is not the person who is to decide any question of fact; that is for the Court or the jury, as the case may be: nor is he to decide any question of law; that is for the judge alone.

The most commonly occurring occasions for such evidence are (1) when the capacity of a testator to make a will is under investigation, and (2) when the question is whether one who has committed a violent act is responsible to the criminal law.

In neither of these inquiries is the insanity of the party *in itself* of the slightest moment—hundreds of insane persons have made valid wills, and hundreds of insane persons have been executed. If people do not like that law, let them get it changed; but for the present that is the law.

That medical men may know how to conduct their examinations, and in what direction to make and to press their enquiries (for a superficial enquiry is often worse than none at all), I set out the rules of law in each case.

In the case of wills it was for a long time thought to be the law that if the mind of the testator was affected by insanity at all, since the mind was supposed to be one single and indivisible entity, then, being affected, it must be unsound, and, as a consequence, testamentary capacity was wanting. As it was put, "Any degree of mental unsoundness, however slight, and however unconnected with the testamentary disposition in question, must be held fatal to the capacity of a testator." But that is not the law.

If one making a will understands what a will is, what its effects are and that he is making a will—if he understands the extent of the property he is disposing of—if he is able to comprehend, remember and appreciate the claims to which he should give effect, for example, claims of relatives, then he is far on the way to be considered competent to make a will, although he may be and may for years have been insane. Then, in the consideration of the claims to which he should give effect, there must be no disorder of the mind which poisons his affections, or which perverts his sense of right, or prevents the exercise of his natural faculties. Such would destroy or, at least, imperil his testamentary capacity.

The mere fact of the existence of delusions may not be of importance—it is not of importance if the delusion neither exercises nor is calculated to exercise any influence on the particular disposition of property, and a rational and proper will is the result. But if the insane delusion influence his will in disposing of his property and bring about a disposition of it which, if the mind had been sound, would not have made, that disposition is bad.

A medical man called upon to examine a person as to his testamentary capacity should, therefore, carefully inquire into

(1) His appreciation of the nature of a will and its effects,

(2) His appreciation of the property he has to dispose of,

(3) His appreciation of the property he was disposing of by will,

(4) His recollection of persons having claims by kin or otherwise upon his bounty, and his comprehension and appreciation of such claims,

(5) His mental condition, whether so disordered by insanity of any form as to affect his disposition toward such persons, or to change his normal view of right, or to prevent the exercise of his faculties.

(6) Are there any delusions?

(7) If so, are they of such a nature as to influence him in disposing of his property otherwise than he would, were the delusions absent?

In criminal cases, the question of the existence of insanity is also wholly unimportant. It is not the law that an insane man is not responsible before the law. To the physician, as physician, the insane man is sick and requires treatment just like the supposed burglar with his broken leg, but in a court the existence of the disease of insanity is just as unimportant as the existence of the broken leg.

If the proved insanity is not of such a kind as is recognized by the law as an excuse, it is as though he were not insane at all.

The Parliament has authoritatively laid down what kind and degree of insanity do excuse. If a man suffer from disease of the mind to such an extent as to render him incapable of appreciating the nature and quality of the act and of knowing that such an act was wrong, then the law says he is not to be convicted. No word of the law is to be disregarded. The accused to be acquitted must suffer from a disease of the mind not simply, but to the extent named—that is that he is rendered *incapable* of appreciating the nature of what he

does—not that he does not appreciate but that he *cannot* appreciate. And the word *wrong* is not to be interpreted subjectively as it appears to the mind of the accused, for many a man does what he thinks to be right and still is a criminal.

If an insane man is not affected by his insanity to such an extent but that he is able to know what he is doing—"capable of appreciating the nature and quality of the act," and is able to know that this act is wrong, that is, contrary to the law, even if it accord with his own sense of right, he is responsible in law. Charlotte Corday, when she killed Marat, thought she was doing right—that belief would not excuse her under our law if she knew that she was doing what the law forbade.

Then there are those who suffer from a moral insanity, they do not understand any difference between right and wrong which they are bound to respect. They are as responsible in law as Captain Kidd or any other pirate.

It is said, too, that there are those who, being insane, thoroughly know what they are doing and know that their act is against the law, but are forced on by an irresistible impulse to shoot or wound another. I once charged a jury in a murder case that the law of Canada says to those who assert that they are moved by an impulse which they cannot resist, "I shall hang up a rope before your nose and see if that will not help you to resist the impulse." No such defence avails in Canada. An English Court since that time, and, indeed, but the other day said, "Impulsive insanity is the last refuge of a hopeless defence."

I am not defending the law—I had no part in making it—I am bound to obey it, and I am simply stating it.

Again, if there be present specific delusions, the law is clear. Place the accused in the position of the delusions being true, then if the act which he does would be justified or excused, he is not guilty of a criminal act; but if not, he is. Let me illustrate. If A. suffers from the delusion that B. is seeking to kill him, and meeting

B. thinks B. is about to kill him and the only way to save his own life is to shoot B., he is not criminally liable if he does shoot B. But take a case which recently occurred in Toronto. A. thought that B. was spreading the most infamous slanders about him, and, meeting him one day, he shot him. He is liable criminally. The law allows one to kill another if that be the only way to save his own life, but it does not allow the killing of a slanderer, however base.

It may look anomalous to gift in theory one who suffers from delusions with the reasoning powers of one who is wholly sane, but that is the law laid down for us all by the Parliament.

Now, medical witnesses are often fond of laying down what they think should be the law, of saying in the witness box what should be done with an insane accused. That is no part of their duty. If they are not satisfied with the law—and doctors have been girding at it for seventy years and dozens of volumes have been written about it—let them go about it in the right way to have the law changed—use influence with the Parliament, the only body which can make the change. The Court is powerless, and must lay down and apply the law as it actually exists.

The above are the chief occasions on which a medical man meets the law in insanity matters. I add just a word as to capacity to make a contract, rather for the sake of completeness than for its practical importance.

Although insane, one may make a contract binding on himself if he possesses sufficient mind to understand in a reasonable manner the nature and quality of the act in which he is engaged, provided no imposition or fraud is practised upon him and the contract is not grossly inequitable; indeed, a very recent authority goes so far as to lay it down in broad and general terms that a contract made by a lunatic is binding upon him unless he can show that at the time of making it he was to the knowledge of the other party so insane as not to know what he was about.

No. 2.

January, 1912.

Vol. V.

Bulletin

OF THE

Ontario Hospitals for the Insane

*A Journal Devoted
to the interests of
Psychiatry in Ontario*

Printed by Order of the Legislative Assembly



FOR THE DEPARTMENT OF THE PROVINCIAL SECRETARY.

Printed by L. K. CAMERON, Printer to the King's Most Excellent
Majesty.

PROCEDURE TO SECURE ADMISSION OF PATIENTS TO ONTARIO HOSPITALS FOR THE INSANE.

(1) Where the property of a patient is sufficient, or his friends are willing to pay the cost of the Medical Examination, the family Physician should apply directly to the Medical Superintendent of the Hospital for the Insane, in whose district the patient resides, for the necessary blank forms. These being secured, they should be properly and fully filled in, dated, signed in presence of two witnesses by the medical men in attendance. They are then returned to the Hospital, and if satisfactory, and there is accommodation, advice will be sent at once to have the patient transferred. See R.S.O., Cap. 317, sections 7, 8, 9.

(2) Where the patient has no property, and no friends willing to pay the cost, application should be made to the head of the Municipality where he lives, who, after satisfying himself that the patient is destitute, may order the examination to be made by two physicians, and a similar course to the above is then followed. The Council of the Municipality is liable for all costs incurred, including expenses of travel. See R.S.O., Cap. 317, section 11, subsections 1 and 2.

(3) Where the patient is suspected to be dangerously insane, information should be laid before a magistrate, who may issue a Warrant for the apprehension of the patient, and if satisfied that he is dangerously insane may commit the patient to the gaol, or some safe place of confinement, and notify the Medical Examiners. The Magistrate should then send to the Inspector of Prisons and Public Charities, Parliament Buildings, Toronto, all the information, evidence and certificates of insanity. The costs incurred by this method form a charge against the County, City or Town in which such patient resided. See R.S.O., Cap. 317, sections 12 to 20.

No. 2.

January, 1912.

Vol. V.

Bulletin

OF THE

Ontario Hospitals for the Insane

*A Journal Devoted
to the interests of
Psychiatry in Ontario*

Printed by Order of the Legislative Assembly.



FOR THE DEPARTMENT OF THE PROVINCIAL SECRETARY.

Printed by L. K. CAMERON, Printer to the King's Most Excellent Majesty.

TABLE OF CONTENTS,

	PAGE
Insanity in Its Legal Aspects. By the Honourable William Renwick Riddell, L.H.D., etc. Justice King's Bench Division, H. C. of J., Ontario.....	3
The Insane in Japan. By Frederick Peterson, M.D., Professor of Psychiatry, Columbia University, New York	10
Voluntary Admissions to the Hospital for Insane, Toronto. By J. M. Forster, Medical Superintendent	18
Five Hundred Consecutive Admissions to the Hospital for Insane, London. By W. J. Robinson, M.D., Medical Superintendent	25
A Case of Dementia Præcox Paranoia of Long Standing, with Delusions, but no Perceptible Deterioration of Senses. By J. F. Cattermole, M.D., Assistant Superintendent, Hospital for Insane, Penetanguishene, Ont.	31
Case of Paranoid Dementia Præcox with Early Symptoms Resembling Those of Paresis. By W. A. Marshall, Assistant Physician, Hospital for Insane, Hamilton	35
A Common Skin Disease Seen in the Hospitals for the Insane—Psoriasis. By C. M. Crawford, M.D., Assistant Physician, Hospital for the Insane, Brockville	46
A Case of Aneurysm, Associated with General Paresis. By C. S. McVicar, M.B., Pathologist to Toronto Hospital for Insane. Assistant in Clinical Medicine, University of Toronto.....	55
Book Reviews	62

The Bulletin

OF THE

Ontario Hospitals for the Insane

*A Journal Devoted to the Interests of
Psychiatry in Ontario.*

INSANITY IN ITS LEGAL ASPECTS.

BY THE HONOURABLE WILLIAM RENWICK RIDDELL,
L. H. D., ETC.

Justice King's Bench Division, H. C. of J., Ontario.

A Word with Alienists.

Early one morning a doctor and a policeman going along the street found a man lying opposite a store. Enquiry soon disclosed that he had a broken leg. To the medical man the sufferer at once became the patient, but to the policeman he remained but a possible burglar. To the doctor it made no difference whether the man was the most hardened criminal in the world; his art and science are wholly at the disposal of a Bill Sykes as of a Seth Pecksniff or a Ned Cheeryble. To the policeman it made no difference whether the stranger had one broken bone or fifty, whether there could be a cure without shortening or whether he could ever expect to walk with ease again. What the policeman was concerned with was, "had the man been breaking the law? and, if so, what was the available evidence?"

They both took part in conveying him to the hospital, the doctor that there might be a better chance of perfect recovery, the policeman that he might the better know where to put his hand upon the suspected. Had a clergy-

man happened along, he would probably have been anxious about the poor man's spiritual condition and the salvation of his soul; these to the physician were only of importance as they bore upon the treatment and prognosis (and that would be almost if not quite infinitesimal), while the policeman, as policeman, would care nothing about it at all, and not be inquisitive even as to whether the man had a soul at all, and, if so, whether it was worth saving or trying to save. Now, none of these viewpoints is higher than either of the others, but all are radically different.

It is from not bearing in mind the different aspects from which the same facts are to be and are considered, that there is so much disputing about the insane; so much time wasted in the courts over expert testimony, and so much contempt expressed by the lawyer for the medical expert on insanity which is only equalled by the contempt of many a medical expert for the rules of law in that respect.

If it should happen that a judge were to be called in by a medical man to assist in the treatment of an insane man, he would necessarily follow out the methods of medical treatment. And so where a medical man is called upon to assist in the administration of the law, he must adapt himself for that occasion to the principles of the law. Neither judge nor lawyer need, while assisting in the province of the other, abandon the views he holds in his own province, nor does he. To the medical man the insane person is a sick man to be treated for his disease, and it is a matter of indifference whether he is a criminal or not; to the judge it is a matter of indifference whether a prisoner or a litigant be insane or not, the question is, is he capable of making a contract, is he responsible for his acts? One more thing before attacking our main theme—the judge does not make the law; that is either a matter of tradition or of legislation, in either case of binding authority. He cannot change or avoid the law—for which he is no more responsible than the doctor is for

the insanity of a patient or for the laws of nature governing insanity. And this law is binding upon all citizens, and all good citizens should obey the law in this as in all else. If the law does not suit the doctor or any one else, he may do his best to have it changed by Parliament; but it is the bounden duty of every one to obey the law so long as it is law.

As most of the instances in which medical men come in contact with the law are cases of insanity, real or alleged, I have thought it not without advantage to deal with the law in respect of insanity so far as medical men are likely to be affected.

Sometimes a doctor is called upon to examine one alleged to be insane, in order that he may be committed or declared by the courts to be insane. The opinion of a medical man is practically worthless if given simply as an opinion. The Court determines the question of insanity, and requires the medical witness to set out in his affidavit in full his reasons for his conclusions. Care should be taken to preserve and transmit all the conversation (if any) and all other indicia from which the practitioner has formed his judgment.

Again, and this is the most frequent case, a medical man is called as a witness in court upon the question of insanity. He may be an ordinary, though skilled, witness to set out the facts of the condition of the person whose mental state is under investigation, or he may be an expert witness called simply to give an opinion, or he may act in each capacity.

A witness should always bear in mind that he is not the person who is to decide any question of fact; that is for the Court or the jury, as the case may be; nor is he to decide any question of law, that is for the judge alone.

The most commonly occurring occasions for such evidence are (1) when the capacity of a testator to make a will is under investigation, and (2) when the question is whether one who has committed a violent act is responsible to the criminal law.

6 INSANITY IN ITS LEGAL ASPECTS

In neither of these inquiries is the insanity of the party *in itself* of the slightest moment—hundreds of insane persons have made valid wills, and hundreds of insane persons have been executed. If people do not like that law, let them get it changed; but for the present that is the law.

That medical men may know how to conduct their examinations, and in what direction to make and to press their enquiries (for a superficial enquiry is often worse than none at all), I set out the rules of law in each case.

In the case of wills it was for a long time thought to be the law that if the mind of the testator were affected by insanity at all, since the mind was supposed to be one single and indivisible entity, then, being affected, it must be unsound, and, as a consequence, testamentary capacity was wanting. As it was put, "Any degree of mental unsoundness, however slight, and however unconnected with the testamentary disposition in question, must be held fatal to the capacity of a testator." But that is not the law.

If one making a will understands what a will is, what its effects are and that he is making a will—if he understands the extent of the property he is disposing of—if he is able to comprehend, remember and appreciate the claims to which he should give effect, for example, claims of relatives, then he is far on the way to be considered competent to make a will, although he may be and may for years have been insane. Then, in the consideration of the claims to which he should give effect, there must be no disorder of the mind which poisons his affections, or which perverts his sense of right, or prevents the exercise of his natural faculties. Such would destroy or, at least, imperil his testamentary capacity.

The mere fact of the existence of delusions may not be of importance—it is not of importance if the delusion neither exercises nor is calculated to exercise any influence on the particular disposition of property, and a rational and proper will is the result. But if the insane

delusion influence his will in disposing of his property and bring about a disposal of it which, if the mind had been sound, would not have made, that disposition is bad.

A medical man called upon to examine a person as to his testamentary capacity should, therefore, carefully inquire into

(1) His appreciation of the nature of a will and its effects.

(2) His appreciation of the property he has to dispose of.

(3) His appreciation of the property he was disposing of by will.

(4) His recollection of persons having claims by kin or otherwise upon his bounty, and his comprehension and appreciation of such claims.

(5) His mental condition, whether so disordered by insanity of any form as to affect his disposition toward such persons, or to change his normal view of right, or to prevent the exercise of his faculties.

(6) Are there any delusions?

(7) If so, are they of such a nature as to influence him in disposing of his property otherwise than he would were the delusions absent?

In criminal cases, the question of the existence of insanity is also wholly unimportant. It is not the law that an insane man is not responsible before the law. To the physician, as physician, the insane man is sick and requires treatment just like the supposed burglar with his broken leg, but in a court the existence of the disease of insanity is just as unimportant as the existence of the broken leg.

If the proved insanity is not of such a kind as is recognized by the law as an excuse, it is as though he were not insane at all.

The Parliament has authoritatively laid down what kind and degree of insanity do excuse. If a man suffer from disease of the mind to such an extent as to render

him incapable of appreciating the nature and quality of the act and of knowing that such an act was wrong, then the law says he is not to be convicted. No word of the law is to be disregarded. The accused to be acquitted must suffer from a disease of the mind not simply, but to the extent named—that is that he is rendered *incapable* of appreciating the nature of what he does—not that he does not appreciate but that he *cannot* appreciate. And the word *wrong* is not to be interpreted subjectively as it appears to the mind of the accused, for many a man does what he thinks to be right and still is a criminal.

If an insane man is not affected by his insanity to such an extent but that he is able to know what he is doing—"capable of appreciating the nature and quality of the act," and is able to know that this act is wrong, that is, contrary to the law, even if it accord with his own sense of right, he is responsible in law. Charlotte Corday, when she killed Marat, thought she was doing right—that belief would not excuse her under our law if she knew that she was doing what the law forbade.

Then there are those who suffer from a moral insanity, and they do not understand any difference between right and wrong which they are bound to respect. They are as responsible in law as Captain Kidd or any other pirate.

It is said, too, that there are those who, being insane, thoroughly know what they are doing and know that their act is against the law, but are forced on by an irresistible impulse to shoot or wound another. I once charged a jury in a murder case that the law of Canada says to those who assert that they are moved by an impulse which they cannot resist, "I shall hang up a rope before your nose and see if that will not help you to resist the impulse." No such defence avails in Canada. An English Court since that time, and, indeed, but the other day said, "Impulsive insanity is the last refuge of a hopeless defence."

I am not defending the law—I had no part in making it—I am bound to obey it, and I am simply stating it.

Again, if there be present specific delusions, the law is clear. Place the accused in the position of the delusions being true, then if the act which he does would be justified or excused, he is not guilty of a criminal act; but if not, he is. Let me illustrate. If A. suffers from the delusion that B. is seeking to kill him, and meeting B. thinks B. is about to kill him and the only way to save his own life is to shoot B., he is not criminally liable if he does shoot B. But take a case which recently occurred in Toronto. A. thought that B. was spreading the most infamous slanders about him, and, meeting him one day, he shot him. He is liable criminally. The law allows one to kill another if that be the only way to save his own life, but it does not allow the killing of a slanderer, however base.

It may look anomalous to gift in theory one who suffers from delusions with the reasoning powers of one who is wholly sane, but that is the law laid down for us all by the Parliament.

Now, medical witnesses are often fond of laying down what they think should be the law, of saying in the witness box what should be done with an insane accused. That is no part of their duty. If they are not satisfied with the law—and doctors have been girding at it for seventy years and dozens of volumes have been written about it—let them go about it in the right way to have the law changed—use influence with the Parliament, the only body which can make the change. The Court is powerless, and must lay down and apply the law as it actually exists.

The above are the chief occasions on which a medical man meets the law in insanity matters. I add just a word as to capacity to make a contract, rather for the sake of completeness than for its practical importance.

Although insane, one may make a contract binding on himself if he possesses sufficient mind to understand in

a reasonable manner the nature and quality of the act in which he is engaged, provided no imposition or fraud is practised upon him and the contract is not grossly inequitable; indeed, a very recent authority goes so far as to lay it down in broad and general terms that a contract made by a lunatic is binding upon him unless he can show that at the time of making it he was to the knowledge of the other party so insane as not to know what he was about.

THE INSANE IN JAPAN.

BY FREDERICK PETERSON, M.D.,

Professor of Psychiatry, Columbia University, New York

During a vacation spent last summer in Japan, I visited a number of institutions for the insane, and through the many courtesies of Prof. Kure and Prof. Miura of Tokyo and Prof. Imamura of Kyoto, I not only saw them under the best auspices but was furnished with much information in relation to psychiatry in Japan which I shall briefly put before you.

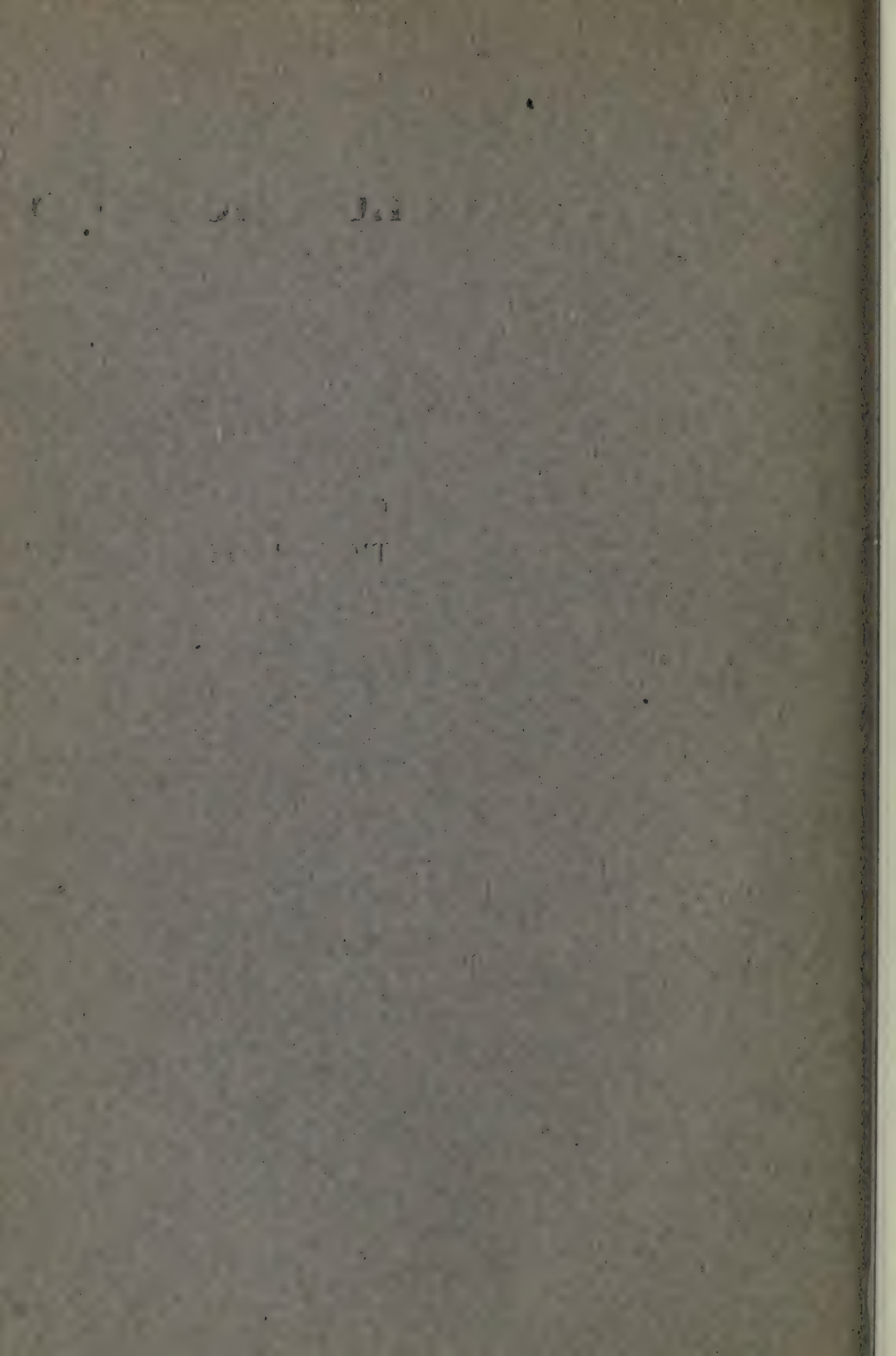
The medicine of ancient Japan, like its art, literature and religion, was derived from China by way of Corea. The earliest Chinese medical literature which deals in any manner with insanity dates from about 200 B. C. The earliest historical reference to insanity in Japan is contained in the law of about 702 A. D., which required the insane, epileptics, lepers, blind and crippled to be given over to certain official caretakers, who, on taking such cases into their families, were absolved from taxation and civic duties. Between these dates and for some time later Japanese physicians were guided in their study and practice wholly by Chinese medical books, in much the same manner as the Europeans for centuries acted only on the authority of Hippocrates, Galen and the Arabian writers. Insanity and epilepsy are well

The Courts and The People

BY

HON. MR. JUSTICE RIDDELL

AN ADDRESS DELIVERED TO THE EASTERN ONTARIO LIVE
STOCK AND POULTRY SHOW, AT OTTAWA, JAN. 18th, 1910.



The Courts and The People

BY

HON. MR. JUSTICE RIDDELL.

AN ADDRESS DELIVERED TO THE EASTERN ONTARIO LIVE
STOCK AND POULTRY SHOW, AT OTTAWA, JAN. 18th, 1910.

Printed by
WILLIAM BRIGGS,
29-37 Richmond Street West,
TORONTO.

THE COURTS AND THE PEOPLE.

Some of my friends of the Toronto press are in the habit occasionally of good-naturedly jibing at me, as the "farmer Judge." I shall not deny the charge—rather, indeed, I would say that I am glad that I was a farmer boy, and I am heartily sorry for those who are brought up in the city, whose playground is the public street—not the virgin wood—who cannot tell the difference between a tamarack and a hemlock; who have never fished in the "crick," and who would not know what it meant if they saw a "mushrat" scuttling for the "swale."

Born and brought up on a Canadian farm, and associating all my life with Canadian farmers, I believe that I know these countrymen of mine. I know that I believe in them, and am proud of them; and the more I meet those of other peoples and occupations, the more that pride is increased. They are the mainstay of the nation; and while the heart and brain of the farmer remain sound, there is no great fear for the future of our land. They hold the power in their own hands, at least as yet, of controlling the destiny of Canada. How that power is to be exercised depends on their honesty and intelligence. Of the honesty, there can be no doubt. Sometimes, indeed, political or social or racial sympathy or prejudice will have a disturbing influence; but, on the whole, right will prevail with them. Of the intelligence, the best evidence is their desire for information upon matters of public moment from those who should know. It is, no doubt, the honest desire for such information which accounts for the fact that I have been asked to speak to you on the subject of "The Courts and the People." I am consequently glad, more than glad, to accede to that request.

In what I have to say, I shall make no attempt at originality. All of it has been said again and again in substance, both by others and by myself. I hope that what will be said will be without any ambiguity, but in perfectly plain language—by which I do not mean offensive language, but plain, simple English, which will express precisely what I mean. Let me, however, premise a word or two.

I am not here to amuse you or to jest with you. The substance of my remarks is of too great importance to be treated lightly, and I have no thought that you are here for entertainment. Again—and this I more particularly urge upon the attention of reporters or newspapers who may honor me by a reference to any of my remarks—it would not be seemly or proper for me, a judge, to act the apologist, or to appear to justify laws, proceedings or rules; and that I shall not do. What I am to do is to state and explain facts, in some cases perhaps the reasons for such facts, but not to argue that they should or should not be; and I shall not be drawn into a controversy. I, as far as possible, speak to you but as a Canadian to Canadians; my official position, of course, throws round me restraints and limitations which I may not transgress; but these will not, I think, prevent my saying all I desire.

I remember very well on the farm at home how we looked upon and spoke of a court as a mysterious something, we knew not what, speaking an extraordinary, strange language, and laying down rules which nobody could understand. No more injurious idea can get abroad; and I shall try to show what courts really are and do.

So soon as man became a social animal, it was necessary that his conduct and actions should be governed by law—that is, rule of some kind. Obedience to

that law was right, and disobedience was wrong. If one violates the rights of another there are but two courses open—the wronged may assert his rights and enforce them if he can by his own strong hand. Then prevails what the poet calls

“The good old rule * * * *
 * * * * the simple plan,
 That they should take who have the power,
 And they should keep who can.”

This is a very old rule indeed, but it is far from being good; and it ought rather to be characterized as “The bad old rule.” This is the state of anarchy—the pitiable state of which the Book of Books speaks: “In those days there was no king in Israel, but every man did that which was right in his own eyes.” Civilized society could not exist if this were the guiding principle.

The other alternative is that rights in dispute be submitted to the decision of some tribunal. Such a tribunal, under whatever name it may be known, is substantially a court; and the extent to which there is submission of rights to the arbitrament of courts is a test of the civilization of a people. The civilization of the people depends largely upon the existence of strong and independent courts; and when for any reason the courts become weak or are held in disrespect, anarchy is not far distant.

It is the boast and pride of English-speaking people that they are governed by law and not by whim or caprice, and that this law is administered by courts, strong, independent and impartial.

There are two forms in which wrongs may be committed—the one a wrong against individuals which the State does not trouble about, and which the individual may forgive if he sees fit; and the other a wrong against an individual indeed, but of such a character as that it affects the well-being of the people, and the State consequently considers the wrong also one against itself. An instance of the former is trespass upon a man’s land, of the latter killing or maiming of a fellow-being; the former class of cases occupies the civil, the latter the criminal, law. There is here no occasion to distinguish these.

Let us understand now what a court is in our land. It is a matter, perhaps, of regret that there is no place in the curriculum of studies for obtaining information as to the theory and practice of courts. Considering the very great part that law plays in our society, it may be a matter for astonishment that the elementary principles of the administration of justice are not made an important part of the curriculum, at least of our advanced schools.

A court is an institution organized for the purpose of declaring rights and of enforcing the remedies which one whose rights have been infringed upon possesses under the law, as well as for punishing wrongs against the State. Our courts are not an end in themselves, they do not exist for themselves, but for the people; and the people pay for them and support them. The moment they are found to be not worth, directly or indirectly, what they cost, they may and should be abolished. Our Courts did not create themselves, they have not come down from immemorial antiquity—their origin is perfectly well known. They are the creation of the Legislature; they are subordinate to the Legislature (not in the sense of being subservient); and the Legislature may change or abolish them at will. The first Legislature which sat in Upper Canada, more than 100 years ago, instituted the King’s Bench, and this has continued with a few changes ever since. The courts have no power in themselves; all they have is derived from the Legislature. Judges are public servants performing duties prescribed for them by the Legislature, and

according to rules laid down for them—which rules they must not disobey. These rules are found in the law.

Our law consists in great part of rules which are the same as those which governed our ancestors many centuries ago; this is called the “English Common Law,” and this English Common Law is the basis and sub-structure of our jurisprudence. The “English Common Law” is simply such of the customs of the ancient people of England as they enforced as rules of conduct; and this English Common Law is the common heritage of most of the English-speaking peoples, as in Canada, the United States, Australia, Africa and the Isles of the Western Sea. One or two States have adopted as their fundamental law the law of ancient Rome, on which is based also the law of Scotland, of France and of Germany; but with these exceptions (and they are few) it may be said that the whole English-speaking world has, as the basis of its law, rules which are practically the old customs of the race.

As society progresses and becomes more complicated, as different sets of circumstances arise and life becomes more complex, there will necessarily arise other rights than those known to the ancestor, and new rules must be made.

Again, it has been found that, by the advance of civilization, the old rules which had been followed have been found not efficiently to meet the exigencies of more modern life: some of the rules have become burdensome, some positively harmful. Then the people have the rules changed; and this change is effected by legislation.

If we take these two sources of the law, viz., the common law and legislation, we have practically the whole body of law which our courts are called upon to administer; although some rules also derived from the Roman law are to be found, which were introduced through the Court of Chancery.

A court is presided over by a judge who has devoted his life to the study of law. It is the duty of the judge to find out what the law is; this he does by the examination of the statutes passed by the various legislative bodies, by the perusal of books of the older law, and by an examination of what other judges have declared to be the law. This is not always easy, and sometimes it involves much labor. Many books may need to be consulted. My own library, and it is not complete, cost me a great deal more than the price of a fair farm—over \$8,000, indeed—and I have not, by any means, all the books that a judge may have to look at.

No doubt it will strike some as rather strange that a judge should be compelled to examine all these authorities in order to determine what the law is; and it has been suggested that there might be drawn up a short, concise code of law which anyone could consult, and in that way at once determine the law upon any particular subject. This course has been adopted in what is called codification of the law upon certain branches—for example, the law upon bills of exchange and promissory notes, criminal law and some others. But it has not been found practicable as yet to codify the whole of the law. And in countries in which codification has proceeded to such lengths as that the whole of the law has been thought to be reduced to a series of propositions, it has not been found by actual experience that the labor of determining precisely what is the law applicable to a particular set of circumstances is much, if at all, lessened.

It has been supposed at times that possibly the presence of lawyers in the Legislature may have something to do with the complexity of the laws. You will remember that Jack Cade was for killing all the lawyers. The experiment of excluding all lawyers from Parliament was tried once many years ago in England. The result was the *parliamentum indoctum*, or “lack-learning parliament.” The old lawyers use a much harsher name—“the Parliament of Fools”—but they may

have been prejudiced. The experiment was a failure. "There never was a good law made thereat," and all their legislation had to be repealed. The experiment has not been repeated.

If you will consider the difficulty of expressing in our highly metaphorical language any but the simplest of ideas without ambiguity, you will, perhaps, understand the difficulty of so-called simple legislation; and ambiguity is the greatest curse in any law.

No one more than the judges would welcome a simplification of the laws; and if you can find gentlemen who can effect this result, *do* elect them as members of Parliament and of the Ontario Legislature. Perhaps as good a test as any would be to invite a candidate to simplify the Municipal Act. That Act has continued to grow; from year to year, it has been found necessary or deemed expedient to provide for cases which had not been foreseen; and it does not seem as though it were yet perfect, notwithstanding its 750 (odd) sections and numerous forms.

But too much should not be made of the intricacy of our laws. Ninety per cent. of the law which is administered in our Courts from day to day is nothing but plain common sense; and it is the rare case which requires much investigation in order to determine what the law precisely is. I do not mean that in ninety per cent. of the cases tried no complicated question of law can arise, but that, taking all the questions upon which a judge has to pass, ninety per cent. of these can be determined upon common sense principles alone. Still it must be said that there are some rare instances necessitating a very great deal of labor on the part of the judge upon whom is cast the duty of determining the governing law.

It is a very common error, and one which, perhaps, has occasioned more criticism on the part of the uninformed than anything else, that judges *make the law*. I cannot too strongly impress upon you the fact that judges do not make the law. The whole duty—the whole power—of a judge is to find out what the law is. He may, indeed, like any other Canadian citizen, express an opinion that the law should be changed; but he has no right to change it. A clergyman would have just as much right to change any of the commandments by leaving out the word "Not," and lay the amended commandment before his flock for their guidance, as a judge has to change the law as he finds it laid down for him.

Some few years ago an organization, formed for most admirable purposes, passed a resolution rebuking one of our judges for obeying the laws of man rather than the laws of God. This is a striking illustration of the mistake to which I have been referring. These good people imagined that the judge had the power to make a law differing from the laws of man, and conforming more to the laws of God as they interpreted them. No judge has any such power; he must apply the law as he finds it; and his only course, if he does not desire to administer the laws as they are, is to resign his office.

Then comes the jury, a body of twelve men in the higher Courts, or of five men in the Division Courts. These are a part of the Court—as much a part of the Court as the judge. It is the judge's life work; but the jurors when they are sworn have, for their temporary and immediate work, their part in administering the law, and quite as important a part as that of the judge himself.

The jurors do not determine the law—the judge is there for the purpose of telling them what the law is, and it is their duty to accept the law as laid down by him. If the judge make a mistake in the law, that mistake will be corrected by a higher Court if necessary. But with that the jurors have nothing to do; their duty is to take the law as the presiding judge lays it down, whether they think that law wise and just or not.

If they are not satisfied with the law, they have the right to call upon their representative in Ottawa or in Toronto in an endeavor to have the law changed. They may communicate with the Minister of Justice or the Attorney-General and may use all the influence which a Canadian citizen has, to have the law made to accord with their views of what it should be. But they have no right in a trial to follow their own views upon what the law is or ought to be—they must accept the law as it is laid down for them by the presiding judge.

I am in the habit of saying to jurors that of the two highest rights possessed by a British subject—the one, the right to select those who will make laws for him, and the other to assist in the administration of the law—the latter is to my mind the more important and the more honourable. To enforce the verdict of the jury, every able-bodied man in the country may, if necessary, be called upon—nay the whole force, military and civil, of the Dominion of Canada and of the British Empire itself may be impressed to make effective the judgment of the twelve in the jury box.

The country has a right to expect that every juror shall bring to his task the highest degree of intelligence of which he is capable; that the juror shall cast aside all feelings of prejudice and sympathy; that he will with absolute honesty apply his mind to the questions to be determined, and that he will allow nothing—race, religion, politics—to prevent his giving an honest verdict according to the evidence. As it is the duty of jurors to find the facts according to the evidence, they should carefully observe everything which is said by the witnesses and the manner in which it is said, so as to enable them to determine in their own minds not only what he says, but also how far he is to be believed. It is the right and often the duty of the judge to express his own opinion as to the facts; but it is not his opinion which is to govern. The remarks which he makes concerning the evidence, the views which he expresses in respect of the facts, are intended only to assist the jury in arriving at a correct conclusion. But his view of the facts is not that which is to prevail; it is the jury who in the long run must make up their own minds as to what the facts are; their view must prevail.

Of course, so long as human nature is what it is, men may, and sometimes will, find it hard to rid themselves of feeling and passion and sympathy and prejudice; but it is the duty of jurymen to do their very best to clear their hearts and minds of all these, and honestly to find the facts according to that part of the evidence which they believe.

No matter what care is exercised in the selection of jurors, it will occasionally happen that some are not of sufficient strength of mind to perform satisfactorily what our law demands of them. And sometimes—it must be admitted—sorrowfully admitted—jurors do not act under a full sense of their responsibility, and so there are miscarriages of justice. Nothing human is perfect, and the administration of justice does not claim perfection—we can only do our best.

Many years ago it was the law that jurors who found a verdict not in accordance with the evidence might be themselves tried by another jury, or might be fined or imprisoned by the trial judge. This practice has long been obsolete; and the juror who now in violation of his oath degrades himself by giving a verdict differing from his honest belief, is free from any punishment except that inflicted upon him by his own conscience and the contempt of his fellow men. A juror who dishonestly gives a wrong verdict is as bad as a thief; he might just as well put his hand into the pocket of the man he wrongs and steal his money. A juror who dishonestly or weakly acquits one fairly proved guilty of a crime is as bad as an accessory—and worse.

Jurors do not, as they did many centuries ago, determine according to knowledge which they themselves may have of the facts. They are sworn to find a

verdict according to the evidence, *i.e.*, they are to find out what the facts of the case are from the evidence of witnesses.

Of course, then, the witnesses play a very important part in Court proceedings. Now, there are various things to be taken into consideration in determining how far a witness is to be believed. The opportunity he has had of observing what the facts are; the accuracy of memory whereby he can call up to his mind what were the facts as he saw or heard them; his honesty and his ability to express in clear language what he means—all these are matters for consideration on the part of the jury. And it is obvious that it would not do to allow a witness simply to get up and say what he has to say, and sit down, having told his story in his own way. He might forget important parts, he might load his story with irrelevant detail, he might speak loosely where exactness was needed, he might express opinions when he was called upon to state facts, he might guess or imagine where he should know, or say he knew where he only fancied, and state as facts what he had only heard; all these dangers and more are ever present. It has been found by long experience that the best method of determining the reliability of the witness and eliciting the truth is cross-examination. Cross-examination does not mean, as so many, even lawyers, seem to think, “examining crossly.” Cross-examination is the art of searching by questions into the mind, memory, capacity, and honesty of the witness in order that the trial tribunal, jury or judge, may see, first, what the witness really means, and, second, how far his testimony is to be relied upon.

I know there have been many complaints about cross-examination; I know, too, that the privileges of cross-examining counsel have sometimes been abused, as every other right may be abused; but it seems quite certain that the value of evidence given by a witness can, so far as the experience of mankind has yet gone, only be tested fully by cross-examination.

Of course, mistakes will happen, but in the vast majority of cases the evidence of the honest witness is not weakened, but it is often strengthened by the most minute and rigorous cross-examination. At the same time, in numberless cases, the dishonest or incompetent witness has been, by that means, shown to be dishonest or incompetent; and the value of his evidence destroyed. And it is to be remembered, too, that witnesses may be perfectly honest and yet may be mistaken. The grounds of their belief should therefore be sifted with care. I rather think that the very persons who most complain about cross-examination would complain very much more if their counsel, in an action in which they were themselves concerned, were not permitted to cross-examine most rigidly the witnesses called against them. For an instance of its value take the well-known case of the charge made against Parnell by the *London Times*. It is common knowledge that that was swept away and destroyed by the cross-examination, by Sir Charles Russell, of Pigott, the forger. And cross-examinations equally effective and useful, if not with such startling results, are seen in our Courts almost daily.

It is not the person who is charged with crime who profits most by this practice; it is a matter of every day experience that criminals bring forward friends to prove an *alibi* or to prove circumstances which would make it impossible that the prisoner could have committed the offence with which he is charged; in hundreds of cases, such evidence has been demolished by careful cross-examination.

I told you in the beginning that I am not here to justify anything. If the people think that cross-examination should not be allowed, they have but to say so, to instruct their representatives to pass the required legislation, and the Courts will act accordingly, the time occupied by trials will be diminished by 50 per cent. or

more, and the work of the judges lightened accordingly. But before the people come to such a conclusion, let each consider how he would like to have his case decided upon the statements of witnesses perhaps hostile to him for some reason, these statements not being sifted by cross-examination.

The question of appeals comes up now and then for discussion; and it may not be out of place if I say a word or two in respect of Appellate Courts.

But first it is to be noticed that in a large percentage of cases tried there is no appeal. From the official report for 1908 I take the following figures: Of the cases tried in the High Court there were appealed about 15 per cent., or, say, 1 in 7 to the Divisional Court, and to the Court of Appeal less than 6 per cent., or 1 in 17. By far the greater number of these appeals were dismissed. Of all the cases in the Divisional Court about 8 per cent., or 1 in 12, were appealed to the Court of Appeal and more than half dismissed. From the Court of Appeal only 9 cases went to the Supreme Court (so far as I can find) and of these 7 were dismissed; while 6 went to the Privy Council.

The theory of appeal is that the trial judge may have made a mistake in the law or facts, or the jury may have made a mistake in the facts, or some evidence has been since discovered which should change the result, or something of that kind. A very large part of the time and labor of a High Court judge is occupied with considerations arising upon appeals, sometimes scores of books must be examined, requiring much time and thought. If appeals could be abolished, all this would be saved; but would people be satisfied with the opinion of one judge upon an important matter? And if there is to be an appeal, is there to be one and no more? All that I cannot discuss; it is for the people themselves, through their representatives, to decide.

It is not always the rich man or the corporation which benefits by an appeal. The last case I had at the bar for a Railway Company, the plaintiff was non-suited at the trial, and she needed to go to appeal in order to get her rightful damages. In the last case I had against a Railway Company, the plaintiff succeeded at the trial, but an appellate court ordered a new trial. The second appellate court, the Privy Council, however, ordered the plaintiff to be paid the verdict which the jury had given her. I remember a case in which my client was sued for a large amount by an American firm; at the trial we succeeded; the Divisional Court reversed the trial judge, and I went to the Court of Appeal; that Court was also against me, but I went to the Supreme Court, and that Court reinstated the verdict which I had got at the trial. Had we stopped at the two lower Courts of Appeal my client would have had to pay a very large sum which he had no right to pay.

The whole question of appeals, and the number of them to be allowed, is a most difficult one, and is not to be decided off-hand by anybody. The experience of other countries may, perhaps, not be without advantage to us. In England they have a Divisional Court, a Court of Appeal, just as we have; and the House of Lords, as we have the Supreme Court at Ottawa. They have no Court beyond, as we have in the Privy Council; but not one-half of one per cent. of our cases go to the Privy Council.

We have almost exactly the same practice, too, as they have in England—but it is impossible for me to pursue that matter in the time at my disposal, or to consider the relation of the legal profession to the administration of Justice.

I shall just say one word about the lawyers. I have been actively engaged in the law for 27 years, and during all that time I have never known or heard of any person so poor, that, having any fair semblance of a claim, he could not have his case submitted to the Courts by a lawyer with all due skill and vigor—in many instances, too, without any real hope of reward. If anyone gets into trouble does he

not, as of course, go to a lawyer? And does he not give him his full confidence? And in how few cases is that confidence betrayed?

At some other time and place I may have more to say about your fellow-Canadians of the legal profession; but for this time, I cannot pursue the subject.

I have already said that where the law is found to be imperfect, the Legislature is called in to correct it. Now there are two theories of the powers of Legislatures which have been adopted by the two branches of the English-speaking peoples. One theory is that the people are not to be trusted; and therefore their power should be restricted. A written document is prepared as the constitution of the country; and the people and their Legislatures are forbidden to go beyond the provisions of that written document. The effect is that what the one generation of men who have framed the constitution think right or expedient is to govern all future generations, no matter how effete the doctrines of the former generation may have become by reason of the changed condition of the nation, or how positively harmful they may have been proved to be by experience. That system has been adopted by the United States of America, who in the Constitution of the United States and in that of the several States have been exceedingly careful to lay down principles and restrictions which are binding upon the people and Legislatures. Any change in the Constitution can be brought about only with great difficulty. Legislation which is found to be opposed to the Constitution is promptly declared invalid by the Courts there. A comparatively large part of the litigation in the United States is upon the constitutionality or otherwise of provisions which the Legislatures have thought it wise to make, from time to time.

The other theory is the theory of the Motherland and of Canada. There is no written Constitution (in this sense) for Great Britain and Ireland. There is no binding declaration of principles such that Parliament cannot annul. The Parliament of Great Britain can legislate upon any subject, and in any manner, without violating the Constitution, in the sense in which I have been using the word—in other words the Courts cannot declare that legislation to be invalid. In Canada, the legislative power is divided between the Dominion and the several Provinces, each of which has its own class of subjects upon which to legislate. The Dominion cannot legislate upon that class of subjects allotted to the Provinces nor can the Provinces legislate on that class of subjects allotted to the Dominion. But within that class of subjects allotted to the Provinces the Legislature may legislate as fully and as effectively as the Parliament of Great Britain and Ireland could do. The Legislature of the Provinces has, amongst other things, the power to avoid or validate contracts made by the Province or by any individual; has the power to avoid legislation or by-laws of inferior bodies, such as County Councils, Township Councils, etc.; of declaring to be valid what would, otherwise, have been invalid by-laws; of declaring property which would otherwise have belonged to A, to be the property of B. The Legislative Assembly has power generally to legislate effectively within the whole region of property and civil rights.

I am not concerned to argue whether it would not have been better had our Province started off with a written constitution such as that of the United States, whereby its Legislature would not have the power of taking away any man's property or of interfering with the validity of contracts—I have said more than once that I am not an apologist for anything, I am only stating facts.

These powers, like the rest of its powers, we and you cannot take away from the Legislature; the Legislature cannot take them away from itself. If the Legislature were to pass a law that no man's property should be taken away from him, the same Legislature could repeal such a law the next day; and if the same Legislature let the law stand, its successor could repeal it. The only way in which any power

which the Legislature has can be effectively taken away, is by the Act of the Parliament of Great Britain and Ireland. It may be—I express no opinion—that if the people of Ontario or the Legislature of the Province were to petition for such a diminution of their powers, the petition would be granted.

But it would be well for all parties to consider what this means. From the time the first Legislature sat in Upper Canada in 1793, 116 years ago, these powers have been vested in the Legislature—if these powers were now taken away, we should have less power over our own affairs than not only our brethren in the old land but also our brethren in Australia, New Zealand and South Africa; rights that we have had for over 100 years would be lost to us. Let it not be forgotten that no *Government* has such powers; it is the Legislature elected by yourselves. If you are not satisfied with any legislation, all you have to do is to elect representatives who will repeal it. The Government can stand only if it is backed by a sufficient number of representatives; and a majority of representatives can pass or repeal any legislation they please.

Now, it would be grossly improper for me to express any opinion as to the propriety of any legislation. I may, however, mention some which has caused discussion.

In some instances property has been left for the benefit of persons named; by change of circumstances, it has become impossible to carry out the will, and those who were clearly intended to be benefited can receive no benefit; the Legislature is asked to direct such a change as will carry out what the testator would probably have done, had he been able to foresee what would happen. The Congress of the United States could not do that, nor the legislature of any State. Our Legislature can.

A township passes a by-law for some public purpose. There has been some technical error so that the by-law is, in law, invalid. Perhaps money has been expended on the strength of it; and the by-law is attacked. The Legislature may step in and validate the by-law; and no one is injured, or only someone who desires to embarrass the townships.

A much needed railway is to be built. It has been granted a bonus by the municipalities through which it passes. The financiers will not buy the bonds, as there is doubt as to the powers of the municipalities, and the railway company cannot get money for its undertaking—the Legislature may make the bonds absolutely valid.

A number of persons combine together to monopolize some line of business to the disadvantage of the public; the contracts made between these persons are perfectly valid in law at the time they are made, but the result is considered harmful to the people at large. In the United States the people would be helpless. A month or so ago I was told by an ex-Chief Justice of a very important State that the great problem in the United States was to prevent the accumulation of vast wealth and power in one hand or a few hands; and he said the difficulty in the way of preventing what he thought was a public calamity was the Constitution. When I told him we had no such constitutional limitations in Canada, he could scarcely believe it. I pointed out to him that we had the same constitution as England, and had no such difficulties. We could legislate away anything of the kind and set aside any combine.

The people, through their representatives, have decided upon a certain policy—this necessitates dealing with property of many individuals—some of these may be unreasonable or some may be adverse to the policy determined upon—litigation may be threatened which will tie up the scheme for months or years. The Legislature makes up its mind as to the proper course and may refuse to allow the litiga-

tion to proceed. What the Legislature says, the Court must obey. I, as a Judge, have no right to express any opinion on any such legislation or upon any legislation at all. What I have to do, is to administer the law as it is made for me. If I do not like any legislation I cannot do anything—I have not even got a vote. If you do not like the legislation, you can, you have a remedy; a judge has none.

What I have said may perhaps help to clear up certain matters which, I have been informed, have been troubling some of you.

For example, a well-known case: One of the Judges was charged with ignorance because he declared the absolute power of the Legislature: in that he but followed the law laid down for him by the highest Court in the Empire, but he was said to be violating *Magna Charta*, and I do not know what all. What he did was simply to obey the law; had he done otherwise, he would have been recreant to his duty.

The other day a judge refused to go on with a case because the Legislature said he should not; he could do nothing else—he was bound to obey the law.

In another case, a very able judge refused to accept a verdict which a jury brought in, as it was not in the correct form; the law says that he must so act. But many an indignant letter appeared in the public press condemning the judge for what he could not help doing if he did his duty.

In another case, a judge charged the jury in such a way, as to the evidence of accomplices, that they found a verdict of “not guilty.” He laid down the law accurately, and had he done otherwise, he would have violated his duty. A miscarriage of justice? Perhaps so, but that is the result in part of circumstances, and in part of the state of the law.

There have been verdicts, too, which shock the community. In some of these cases, the jury were not to blame. The evidence was found not to bear out the charge; and although there could be no real doubt of the guilt of the accused, the jury could not honestly say that there was no reasonable doubt upon the evidence. It is not to be forgotten that an accused is not punished simply because, and when, he has committed an offence. We must first of all convict, and the law says he must be proved to have committed the offence, by evidence which satisfies the jury beyond reasonable doubt. The Parliament of Canada have said that he must be convicted first. If you want a man punished because people, newspaper men, or others, think or say he has committed a crime, get the law changed. If you do not like the law, get it changed; but unless and until it is changed, the jury are bound by it and must if they are honest give effect to it. Many and many a time I have seen a person accused of crime which no one doubted he had committed, and yet because there was a failure of evidence he escaped unwhipped of justice.

And it is not safe to rely upon newspaper accounts of a trial. I do not mean that the reporters wilfully misrepresent what takes place; but sometimes they fail to understand. For example, one of the Toronto papers the other day represented me as shaking hands with a convicted prisoner, when the fact was that he came up in front of my desk to give bail. Sometimes, and most frequently, the reporters take note only of the most striking features of a trial—“the ordinary and common does not furnish good copy”—and in any case it is impossible for any reporter to report the manner and tone of the witnesses, or to do more than give an outline of what they say. Juries are sometimes wrongly condemned by those who would have done the same thing as they had they been in their place.

Unfortunately there are cases in which jurors allow sympathy—particularly if the accused is a woman or a “good fellow”—to sway them in their verdict. They take refuge in the well-known “benefit of the doubt.” I am in the habit of telling

jurors that the doubt an accused is entitled to the benefit of is the honest doubt of an honest man who has honestly applied his mind to the evidence; not a doubt conjured up for the occasion to furnish a pretext for giving way to sentiment or sympathy, and to afford a plausible excuse for violating duty. In my part of the country we call a man a "basswood" man who shirks his duty because it is unpleasant—who is a weakling; and I fear that sometimes jurors turn out to be "basswood" men. But that cannot be helped while human nature remains as it is; and our main consolation is that such is the exception. The same thing is noted in England, Ireland, the United States and the whole globe. How can this be helped? Only by every man who is called as a juror determining to do his duty as a man and a citizen—and doing it.

And before we think of any other method of trial, let us carefully consider if any other method would be more free from defects.

I have long been actively engaged in the law Courts, Counsel and Judge; and I give it as my deliberate opinion that a jury of twelve men is in most cases as good a tribunal for determining fact as any other which has ever been devised, and in many cases the best. The Legislature has in some cases, as, for example, in actions against municipalities for damages, said that juries shall not, but a judge shall, try the issues—I presume because it was thought that juries would incline toward the private individual and against the corporation. Other corporations besides municipalities think that jurors are prejudiced against them, and it may be that there is much truth in that supposition. There are other cases involving law or of a commercial or complicated character which it is not well to trouble juries with; but taking the ordinary case of a conflict of fact between man and man I would rely upon a jury arriving at as sound a conclusion as any bench of judges or any other conceivable tribunal.

Criminal cases are peculiarly for the consideration of a jury under the direction of the judge upon the law—the facts are generally simple and easily understood, and in most cases juries can be relied upon to do their duty.

Your President has asked me to speak to you particularly as to certain cases and explain them to you. Some of these I must not say anything about, as they are still in the Courts. Such of them as are finished I shall speak of, as I understand some of you have been troubled about them. When rightly understood, there is no reason, I think, for uneasiness.

In one case a man was charged with murdering his wife by beating her to death. He had been drinking; but at the trial no one thought that there had been such intoxication as would make any difference, and he was convicted. A new trial was ordered; and the idea seems to have got abroad that the law was laid down that drunkenness is an excuse for crime. If that were so, it would indeed be cause for alarm, for then all a man would have to do when he wanted to murder would be to get drunk. But nothing can be further from the fact. This is what the Court said: Where one man kills another, it is murder if he intended to kill. And a man is held to have intended the natural consequences of his acts, so that if he, without an actual intent to kill, does something which he ought to have known to be likely to kill, it is quite the same as if he actually intended to kill. If a man, drunk or sober, intends to kill and does kill, he is guilty of murder; but although he kill, if he did not intend, actually intend, to kill, but did something which he did not intend to cause death, it may be different. If he was in the possession of his faculties, he must be held to intend the natural result of what he did; but if he was so drunk that he did not know that the natural effect of what he did would be to cause death, the case is different. Then he is guilty of manslaughter only. The judge who

presided at the first trial had not, it was considered, charged the jury fully upon the law; and it was thought right to have a new trial. The law was fully explained to a second jury, and they thought the culprit should be found guilty of manslaughter only. Some juries might have thought otherwise, so might some judges; but that jury had to pass upon the evidence upon their oaths. If they made a mistake, it cannot be helped; the law, however, has not been altered or modified.

In another case a woman was charged with murder of a child. The jury found her guilty of manslaughter. No one who did not hear all the evidence can say whether the jury were justified in so finding or not. If not, and if the jury allowed sentiment or sympathy to modify their verdict—and I do not suggest that such is the case—that is a matter between them and their God, which must be answered for some day—but the law cannot change the verdict, and the law is not changed.

A man was charged with murder, the only evidence against him being that of an accomplice—the law is that it is the duty of the trial judge to advise a jury that it is not in general safe to convict upon the evidence of an accomplice only, but that they may convict notwithstanding, if they see fit. The judge did so charge—the jury did acquit. Until the law is changed (and the judges cannot change it) the jury cannot be blamed.

A company claimed that they had performed all the duties prescribed to entitle them to certain mining lands—the Minister of the Crown whose duty it was to examine into such matters said they had not—the land was sold by the Province for a large sum to another company. This company complained that the former company was claiming what the complaining company had bought from the Province and paid for. The Legislature decided that the title of the purchasing company should be made secure; and such an Act was passed. The Court held, as it must needs hold, that the Legislature had the power to pass the Act. It has been represented that the judge condemned the legislation; that is untrue (he would have been going beyond his duties had he done so)—all he did was to hold that the legislation was valid. If you do not like the legislation, have it changed.

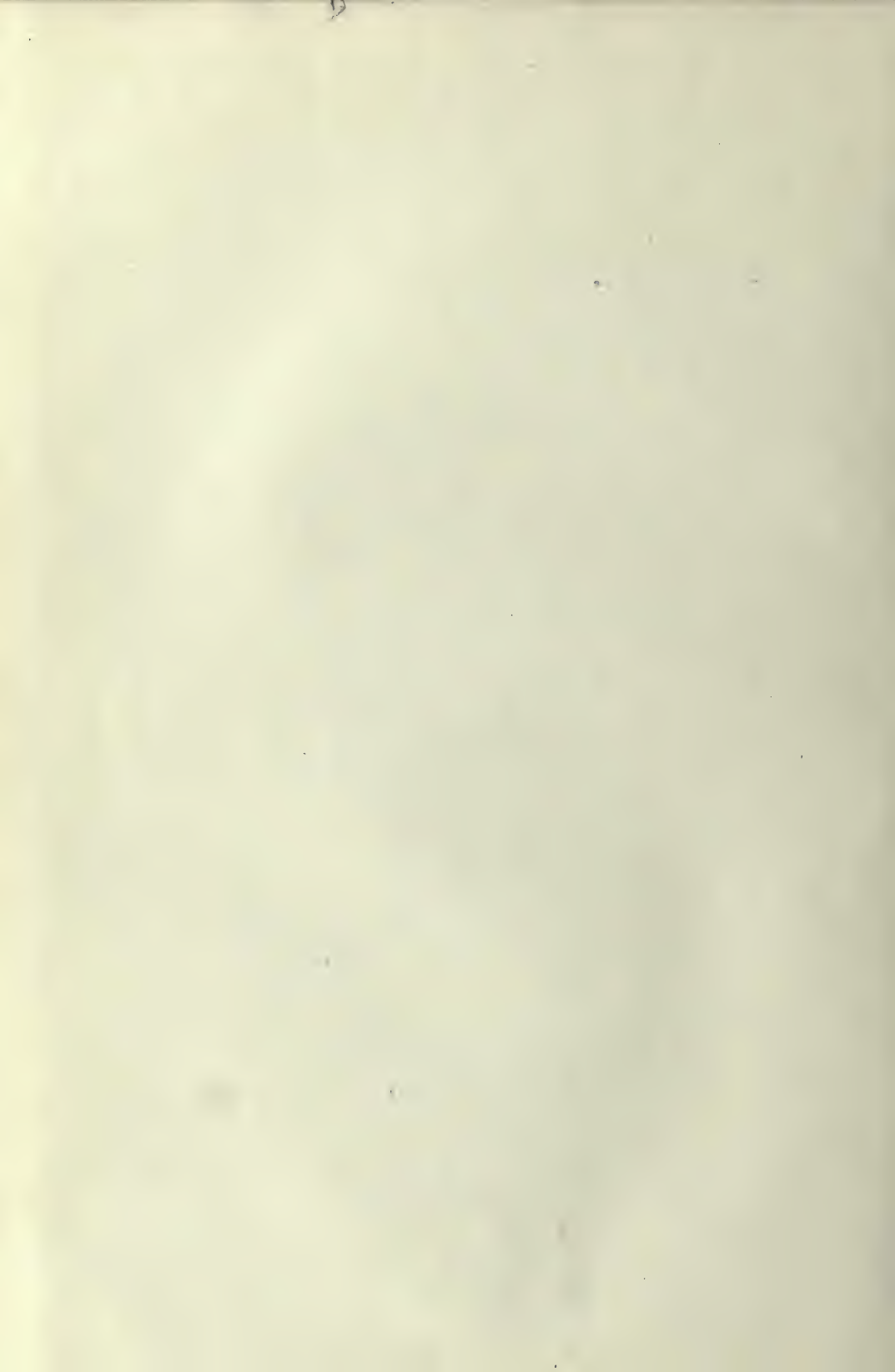
A few remarks in conclusion: I feel that I shall have entirely failed in the objects I had in view, if I have not made clear that we all, you and I, are responsible for the law as it stands. The other day there was a very able and interesting article in a Toronto paper. The theme was that the people of Canada had hanged a murderer. Referring to myself he said "Mr. Justice Riddell helped to hang the culprit." Now, I must willingly accept my share of the responsibility for that Macedonian's death—not quite in the way which may suggest itself to most—that is, in that I pronounced the sentence of death. For that, I disclaim responsibility; I but carried out the explicit direction of the law. But I am one of the citizens of Canada—if I was not satisfied that murderers should be put to death, it was my privilege to raise my voice against judicial killing and exert all my influence against it. This I did not do, and it is, therefore, partly due to me that hanging still takes place. So, too, of you. I am now an officer of the law and I should not take part in changing the law; but if you think that the red slayer is not to die by the hangman's hand, it is open to you to say so. If you can persuade a majority of your fellow-Canadian voters that this practice is wrong, it will be changed; if, however, you think that the assassin should be the first to stop killing, and that the best way to prevent murders is to continue the death penalty, you will do what you can to have the law remain as it is.

Again, the Courts are solely occupied with the law as it is, not as it should be, or might be. No judge is above criticism—he is a public servant and his office exists for the public good—if he is ignorant or negligent or procrastinating, this

is a matter for legitimate complaint. Courts are places for doing business, not for wasting time. But be definite; don't indulge in vague grumbling; name your man, and state what is complained of. Above all things, before complaining, be very sure that the matter complained of is not in reality the law which the judge has been obliged to declare and that the apparent procrastination is not due to the difficulty of the questions of the law to be determined. Of this be very certain—the man who questions the law as laid down by the Court may possibly be right, though the chances are against it—but the man (and there are such) who tries to shake your confidence in the integrity of the Courts is a public enemy. We Judges are not busied with things with which the public have no concern any more than we are demigods, above criticism—we are employed every day in matters of the greatest living importance. We are not apart from, but a part of, the people. We are all loyal Canadians; we are all jealous for the reputation of Canadian Courts and Canadian justice—our interests are the same as yours. If I thought that there were any considerable number who held a contrary opinion, I should begin to despair of the future of Canada; as yet there is no ground for such a fear and, please God, there never will be.

And lastly, may we not all carefully consider whether our people are not allowing themselves to be unduly swayed by sympathy; whether from the influence and example of the adjoining country (or some parts of it), or from loss of moral fibre and strength, or from some other cause, we are not becoming somewhat lax in our administration of justice, getting away from traditional English methods? Is it that we do not look at crime with the abhorrence we should, and so allow some to escape who richly deserve punishment? If so, we must be ourselves punished by our land becoming in respect of the sanctity of human life like those we copy. It may be full time for the public at large to consider whether those whose duty it is to detect crime are assisted as much as they should be, whether in their legitimate efforts they receive the backing of public opinion as they should. We are all perhaps too apt to look upon the prisoner in the dock as a quarry—a game animal—and his prosecution as being in the nature of a sport, and to consider that it is no great matter to anyone but the accused of what he is convicted or whether he is convicted at all; instead of looking at a trial as a stern and careful inquiry by the people into an offence against themselves in which it would be as great a failure of justice and as harmful to the people that a guilty man should escape as that an innocent man should be convicted. And the future of this land, so far as the security of life and limb and property is concerned, lies not in the hands of the police alone, but largely in the hands of jurors. If jurors do their duty we are secure; if not, we retrograde into the ranks of an inferior people.

I have spoken longer than I had intended, but the whole subject is very near to my heart. I want Canadians to get rid of the idea that the Courts are some mysterious entities existing remote and separate from them, and making edicts based upon some absurd and peculiar doctrines or upon the whim and caprice of the judge. I want you to feel that the Courts are yours, administering your law, law which you make, or at least approve, and doing all possible for you, having no interests or desires apart from or antagonistic to yours. We are bone of your bone and flesh of your flesh—brother Canadians and proud of it. So long as you and we understand each other, we shall work in harmony; and so long as we are in harmony and do our honest best, so long, with all the defects which we have in common, and with perhaps a thousand stumbles and falls, the administration of justice in Canada will be held in respect, and the aspiration of the patriot in all ages—“Justice according to Law”—will continue to be realized.



ONE HUNDRED YEARS AGO

AN ADDRESS

BY

THE HONOURABLE

WILLIAM RENWICK RIDDELL, LL. D., ETC.,

OF TORONTO

(JUSTICE OF THE SUPREME COURT OF ONTARIO)

FOURTH AMERICAN PEACE CONGRESS

ST. LOUIS, MAY 3, 1913

ONE HUNDRED YEARS AGO

AN ADDRESS

BY THE HONOURABLE

WILLIAM RENWICK RIDDELL, LL.D., ETC.

(JUSTICE SUPREME COURT OF ONTARIO)

[At the Fourth American Peace Congress, St. Louis, Missouri,
May 3, 1913]

In 1879 a well-preserved lady of eighty-one years of age, seated in her beautiful home overlooking the Canadian Thames, wrote to her cousin, a gentleman of high official standing in Ontario, her reminiscences of the war of 1812. She said: "In May of 1814 we had several days of heavy fog. On the morning of the 13th, as the fog lifted, we saw seven or eight ships under the American flag anchored off Ryerse, with a number of small boats floating by the side of each ship. As the fog cleared away they hoisted sail and dropped down three miles below us, opposite Port Dover. Of course, an invasion was anticipated, but no resistance was offered. On the 14th, the Americans burned the village and mills of Dover; on the 15th, as my mother and myself were sitting at breakfast, the dogs kept up an unusual barking. I went to the door to discover the cause; when I looked up I saw the hillside and fields covered with American soldiers. They had marched from Port Dover to Ryerse. Two men stepped from the ranks, selected some large chips and came into the room where we were standing and took some coals from the hearth without speaking a word. My mother knew instinctively what they were going to do. She went out and asked to see the commanding officer. A gentleman rode up to her and said he was the person she asked for. She entreated him to spare her

property and said she was a widow with a young family. He answered her civilly and respectfully, and expressed his regret that his orders were to burn, but said that he would spare the house, which he did. . . . Very soon we saw columns of dark smoke arise from every building; and, of what at early morn had been a prosperous homestead, at noon there remained smouldering ruins. . . . My father had been dead less than two years. Little remained of all his labors excepting the orchard and cultivated fields."

During the lifetime of her husband, the young wife, who had come from New York, had yearned to return to her native land; "could not relinquish the hope of emerging from the woods and being once more within the sound of the church-going bell," and had been promised by her husband that after she had for six years given "the country a fair trial, if she then disliked it, and wished to return to New York, he would go back with her; the party feeling by that time would have greatly subsided."

Her daughter continues: "It would not be easy to describe my mother's feelings as she looked at the desolation around her . . . but there was no longer a wish to return to New York."

Captain Samuel White, of the Pennsylvania militia, who took part in this invasion, published an account of his experiences in a 12mo, Baltimore, 1830. He seems to justify the burning, as he claims that the houses burned belonged to officers who had been engaged in the expedition against Buffalo and Black Rock the year before.

Assuming the good faith of this claim and that it was a valid excuse if true, let us see what the expedition of the previous year was. In December, 1813, a British-Canadian force of about fourteen hundred men crossed the River Niagara at Lewiston, with the avowed object of attacking the American troops at Black Rock and Buffalo, which were assembled, it was thought, "to attempt the prosecution of the atrocious system begun at Fort George of laying waste our peaceful frontier." The orders of Lieutenant-General Drummond were to disperse this force and destroy "the villages of Buffalo and

Black Rock in order to deprive the enemy of the cover which these places afford."

This invading army performed its task very thoroughly; the troops were scattered; the houses along the river, and the villages of Buffalo and Black Rock burned. The official report of the British General says: "The town (Buffalo) itself (the inhabitants having previously left it) and the whole of the public stores, containing considerable quantities of clothing, spirits and flour, which I had not the means of conveying away, were set on fire and totally consumed, as was also the village of Black Rock on the evening it was evacuated."

The New York Evening Post of January 11, 1814, said: "This all arises from the wanton and abominable act of Gen. McClure in burning Niagara after he and his militia abandoned Fort George;" and added that the war will "be carried on after this more to satiate the revengeful feelings of commanders and individuals than to obtain any great national benefit from it."

This brings us back to Gen. McClure. He had been in possession of Fort George, Upper Canada, a few weeks before but had deemed it prudent to retire, on the advance of a British-Canadian force; and when he retired, he laid in ashes the unfortified village of Newark, a short distance away. The New York Evening Post of December 29, 1813, said: "The destruction and misery which this dastardly conduct has occasioned is scarcely to be described. Women and children, being the principal inhabitants, have nowhere to place their heads." Dr. Withrow tells of the wife of Councilor Dickson, lying ill in bed, carried out to the snow in the bed clothes, and lying watching in that bitter December night the destruction of her home with its valuable library. Many tell of vain attempts to save their homes, putting out the flames while the soldiers went around with torches, setting on fire. "Sometimes the fire would be put out by the owners, only to be lit again and again, the owners standing by to see the eventual destruction of all they valued."

These were not all the feats of arms in that war of a century ago. Toronto had been taken in April, 1813, and the

public offices burned, including the Court House and Parliament Buildings; the church was robbed of its plate and the library consumed with its records and most of its books. What were saved were kicked around the streets. The evacuation of Toronto took place exactly one hundred years ago, and it was re-taken three months afterwards.

In July, 1814, Admiral Sir Alexander Cochrane issued from Bermuda a proclamation declaring for retaliation, at the request of the Canadian Governor. It read: "Whereas, by letters from His Excellency, Lieutenant-General Sir George Prevost . . . it appears that the American troops in Upper Canada have committed the most wanton and unjustifiable outrages on the unoffending inhabitants by burning their mills and houses and by general devastation; and, whereas, His Excellency has requested that in order to deter the enemy from a repetition of similar outrages I would assist in inflicting measures of retaliation; you are hereby required and directed to destroy and lay waste such towns and districts upon the coast as you will find assailable . . . you will spare merely the lives of the unarmed inhabitants of the United States. For only by carrying this retributory justice into the country of our enemy can we hope to make him sensible of the impolicy, as well as the inhumanity, of the system he has adopted."

And so a British force came up the Patuxent to Benedict and destroyed some tobacco, to Lower Marlborough and destroyed some more with the building; then to Washington, burned the capitol and the navy yard, destroying \$7,000,000.00 worth of public property and some private property as well.

What a magnificent exhibition of the logic of War!

The American soldier, as he rendered Canadian families homeless in the middle of a Canadian winter, proved conclusively that Britain had no right to impress British seamen on American vessels; the redcoats, when they burned Buffalo, proved that she had; the victorious American kicking along the streets of muddy York the books of the public library advanced an earnest and cogent argument against the orders

in Council already repealed, and the flames of the capitol and navy yard seemed unanswerable in the opposite sense.

But notwithstanding these brilliant efforts of ratiocination, the envoys charged with bringing about a peace did not even obtain a decision on any one point in dispute which had been advanced as a cause for war. That most uncommon of all faculties which we English-speaking people call common sense, the English-speaking people claim to possess in the highest degree—I am not sure that they do not sometimes claim a monopoly—and that common sense in both contending nations forced the negotiators to come to terms even although that involved an absolute ignoring of all the alleged causes of the war.

Negotiations were going on in Ghent for months concurrently with operations in the field; neither negotiation nor battle had any effect; it was the common sense, the moral sense of the two peoples, which triumphed. It may perhaps be a matter for congratulation that the latest hostile attacks by either upon the land of the other contestant failed; while the Kentucky Mounted Riflemen were driven from Western Canada, Pakenham suffered defeat at New Orleans.

I have said no word of blood and agony and death; of splendid manhood and courage of thousands and tens of thousands lost to the Continent and the Islands; wounded cripples, living out the rest of their lives in pain and helplessness; the wail and tear of the widow and orphan; or of the dislocation of affairs, national, business, domestic, the pouring out of treasure, the destruction of natural resources. And with all the valor and self-sacrifice on either side, and all the unutterable barbarity and cruelty of the some on either side, what was settled by this war? Nothing, literally nothing.

There was, indeed, another demonstration of the fact that he whom we call the Anglo-Saxon will sooner fight than eat if he can find a pretext; that when he does fight, he fights with all his might; that he gives himself up to the cause he espouses with his whole heart; that he exhibits a valor unexcelled by any nation, ancient or modern, a devotion and self-sacrifice like those of the Spartan of Thermopylæ, the Theban of Manlinaea. Nor has he shaken off the brutality of his progenitors,

but is capable of acts of gratuitous, illogical, and senseless inhumanity.

But the whole world knew all that long before, and needed no new lesson. A wicked, wanton war, costly in blood and treasure settled nothing.

Not wholly without effect, however, was it?

Upper Canada was peopled chiefly by those who had left the new Republic; some before, but most after the Treaty of Peace in 1783. These United Empire Loyalists are but now receiving some measure of justice from American writers; their fidelity to principle is hardly yet fully recognized. Within six months, I have been told by an intelligent gentleman in this state (I insist on the intelligence—he was a Judge, and I stand by my Order) that the objection he had to these people was that they were traitors to their country in order to keep their property from being seized, preferring their lands to their land. This of a class of men who sacrificed everything they had from devotion to the Empire and Flag, who refused to barter their fealty for their confiscated lands and . . .

“Got them out into the Wilderness,
The stern old Wilderness;
But then—’twas British Wilderness!”

“They who loved
The cause that had been lost—and kept their faith
To England’s Crown and scorned an alien name,
Passed into exile; leaving all behind
Except their honor. . . .
Not drooping like poor fugitives they came
In exodus to our Canadian wilds,
But full of heart and hope, with heads erect
And fearless eye, victorious in defeat.
With thousand toils they forced their devious way
Through the great wilderness of silent woods
That gloomed o’er lake and stream, till higher rose
The northern star above the broad domain
Of half a continent, still theirs to hold,
Defend and keep forever as their own.”

These men, monarchists, were of the same breed as those who were left behind in the United States, republicans; the two factions were alike set upon their respective views of government as were Roundhead and Cavalier a century and more before, and while there were on either side those unworthy of respect—revolutions are necessarily non-moral and we can not expect a revolution either to be advanced or crushed by forces uniformly virtuous and admirable—there is no valid reason for inferring that either side was superior to the other in manhood and integrity. Those who support a beaten cause are always at a disadvantage. Even yet in England, at least aristocratic England, the Roundhead has not come into his own.

With the new Canadian, loyalty was a passion; but he did not cut all acquaintance or refuse to do business with his brother who had been successful in a rebellion against the Crown. The student of Canadian history will find numberless instances of the United Empire Loyalist returning and living for a time with his former friends and relatives, and the American sojourning with his Tory friend in his new home. Moreover hundreds of the rebellious Americans came into Upper Canada to make there their permanent residence, hoping for a fortune, or at least a competence, as within the last few years hundreds of thousands of Americans have come to our Canadian Northwest.

The student of early Upper Canada affairs comes across many instances of the emigrant returning to the home of his nativity to bring away his affianced left behind; and some maidens who came across the river with Loyalist father returned with Continentalist bridegroom. Some, too, there were who, like Mrs. Ryerse, had hoped "to return in a few years, for party feeling would by that time have greatly subsided." The mere party feeling was not active, the anger, indignation, excited by the refusal of several of the States to implement the implied promises of the fifth article of the Treaty of Peace for reimbursement to the Loyalists for their confiscated estates, had died down; new homes had been made in lieu of the old and there was abundant, if rude, plenty. A

feeling of friendship, of kinship, was making its way on both sides of the international line.

Then came the War. I make no enquiry into its origin; recent American historians have done that thoroughly and well. Whatever the origin and ostensible causes, the Canadian saw his country overrun by those whom he had looked upon as brethren, his substance given to the flames, his children slaughtered, all in a quarrel in which he had no part.

As with Mrs. Ryerse, "that was no longer a wish to return to New York;" affection and friendship were replaced by indignation and hate. Loyalty, which was a passion with the first settlers and which has not been bred out in their descendants, came to be identified with hatred of the neighbor who was by birth a kinsman, but who had shown himself an implacable enemy.

Dr. Russell speaks of the anger and indignation over the burning of the navy yard and capitol expressed by Americans he met upon his visit to Washington fifty years after the event. I can speak from personal knowledge of anger and indignation by descendants of those on Canadian soil who had considered themselves injured a hundred years ago. International hatred dies hard, and it is but the other day that school boys in either country ceased (if they have ceased) to sup full of the outrages committed by the soldiers of the other and the glorious, victorious and resplendent valor of those of their own.

Why all this anger, this indignation? War is hell, and always has been. One does not hear the German complain of the ravages of the French forces during the Napoleonic wars, nor does the Frenchman's eyes flash when he thinks of 1871. War is war, and no fault could be found with an enemy for doing his worst. Why, then, did American and British-Canadian feel so keenly and resent so bitterly the usual incidents of war? Was it not the feeling that the two peoples are one? that the division between them is infinitesimal both in point of time and in point of substance when compared with the long history which they have in common, their common

ancestry and their fundamental and essential unity in everything which make a people?

It was not because "an enemy hath done this," but because a brother hath done this that the anger was real, the indignation unappeasable.

"And to be wroth with one we love
Doth work like madness in the brain."

And even in their ashes live the wonted fires of past wrongs and discords, ever ready to burst out into renewed flame, destroying confidence and affection brought into existence in the intervening time by acts of kindness and brotherhood.*

*Dr. Dunlop, an Anglo-Canadian army surgeon (afterwards Member of Parliament in Canada) who was attached to the Royal Forces during the war, tells two stories which are worth the consideration of both American and Canadian. "Recollections of the American War, 1812-14, by Dr. Dunlop, Toronto, 1905."

A battle had taken place. Dr. Dunlop says "We had obtained a victory but lost severely in so doing, and the enemy in consequence of the masterly arrangements of Major General Scott, one of the best soldiers in the American army (and one of the most gentlemanly men I have ever met with), had retired on Fort Erie." The narrative then proceeds: "There is hardly on the face of the earth a less enviable situation than that of an Army Surgeon after a battle—worn out and fatigued in body and mind, surrounded by suffering, pain and misery, much of which he knows it is not in his power to heal or even to assuage. While the battle lasts these all pass unnoticed, but they come before the medical man afterwards in all their sorrow, stripped of all the excitement of the 'heady fight.'"

"It would be a useful lesson to cold-blooded politicians who calculate on a war costing so many lives and so many limbs as they would calculate on a horse costing so many pounds—or to the thoughtless at home, whom the excitement of a gazette, or the glare of an illumination, more than reconciles to the expense of a war—to witness such a scene, if only for one hour. This simple and obvious truth was suggested to my mind by the exclamation of a poor woman. I had 220 wounded turned in upon me that morning, and among others an American farmer, who had been on the field either as a militia man or a camp follower. He was nearly sixty years of age, but of a most Herculean frame. One ball had shattered his thigh bone, and another lodged in his body, the last obviously mortal. His wife, a respectable elderly looking woman, came over under a flag of truce, and immediately repaired to the hospital where she found her husband lying on a truss of straw, writhing in agony, for his sufferings were dreadful. Such an accumulation of misery seemed to have stunned her, for she ceased wailing, sat down on the ground, and taking her husband's head on her lap, continued long, moaning and sobbing, while the tears flowed fast down her face; she seemed for a consider-

The war came to an end through the efforts of those removed from its sphere of action. I am not wrong in putting it thus: those engaged in the war on both sides desired its continuance.

Now let us contemplate another scene:

On the 22d of September, 1816, two gentlemen arrived from Portland at the small New Brunswick town, St. Andrews. One was John Holmes, a resident of what was then part of Massachusetts, but soon to become the State of Maine. He had been a member of the Massachusetts Legislature and was to be a Congressman and a United States Senator, a man of high standing in his community and a true patriot.

The other was Colonel Thomas Barclay, of Nova Scotia, who had recently been British Consul-General at New York, a man of much acuteness and business ability. These two had met at Portland, representing their respective national governments in an enquiry concerning the international boundary. Britain claimed certain islands in Passamaquoddy

able time in a state of stupor, till awakened by a groan from her unfortunate husband, she clasped her hands, and looking wildly around, exclaimed, 'O that the King and the President were both here this moment to see the misery their quarrels lead to—they surely would never go to war again without a cause that they could give as a reason to God at the last day, for thus destroying the creatures that he hath made in his own image.' In half an hour the poor fellow ceased to suffer."

Dr. Dunlop speaks in another place of the Glengarry Regiment of Canadian Militia. He tells us, "In this regiment there were a father and three sons, American U. E. Loyalists, all of them crack shots. In a covering party one day the father and one of the sons were sentries on the same point. An American rifleman dropped a man to his left, but in so doing exposed himself, and almost as a matter of course was instantly dropped in his turn by the unerring aim of the father. The enemy were at that moment being driven in, so the old man of course (for it was a ceremony seldom neglected) went up to rifle his victim. On examining his features he discovered that it was his own brother. Under any circumstances this would have horrified most men, but a Yankee has much of the stoic in him, and is seldom deprived of his equanimity. He took possession of his valuables, consisting of an old silver watch and a clasp knife, his rifle and appointments, coolly remarking, that, it 'served him right for fighting for the rebels, when all the rest of his family fought for King George.' It appeared that during the revolutionary war his father and all his sons had taken arms in the King's cause, save this one, who had joined the Americans. They had never met him from that period till the present moment; but such is the virulence of political rancour, that it can overcome all the ties of nature."

Bay, as did the United States. During the war the British seized at least one of them and continued to hold it, though before the war it had been granted to landholders by the State of Massachusetts. What better excuse for a war could there be than such a state of affairs? "National honor!" "National territory!" "What we have we hold!" "Not one foot of American soil will ever be given up on any pretext," etc., etc. Do you not hear the Jingo?

But these two gentlemen sat down quietly, and after a number of hearings in St. Andrews and Boston drew the international boundary where it has ever since continued, dividing the islands between the contesting parties, each of the representatives yielding a part of his individual opinion for the sake of harmony and peace.

The United States received the three islands, Frederick, Dudley and Moose, and never even in recent years has there been a word of complaint.

"Peace hath her victories no less renowned than war" and "*Melior tutiorque est certa pax, quam sperata victoria.*"

But you may say the matter in dispute was, after all, unimportant—not worth fighting about. I agree it was not worth fighting about; but there have been many and bloody wars with much less excuse.

Let us, however, take another case. After the United States beat Britain by a head in the race for California, there arose a dispute destined to be of long standing as to the boundary between their territories. Britain claimed down to the mouth of the Columbia River between 46° and 47° north latitude; the United States, up to 54° 40'. In 1818 an arrangement was entered into that for ten years the strip in dispute should be open to settlers from either nation without prejudice to the claims of either. In 1824 and 1826 attempts were made to determine the international boundary, but in vain; and in 1827 the arrangement was extended indefinitely.

Polk's election was fought and won in 1844 on the party slogan, "Fifty-four forty or fight," and the President in his inaugural address said about as much. England replied in like tone and war was universally expected. But election cries are

one thing, legislation another—at least this was so seventy years ago. Arbitration indeed was refused, but two diplomats got together and discussed the situation with candor; and an offer of the Imperial Government to “split the difference” at the 49th parallel was accepted in 1846; the British Government adopting a line which had been offered to them at least twice before. Now here was a strip 400 miles wide, stretching half across the continent, worth untold millions, but the two countries could not get up a war over even that splendid territory.

The trouble was not over: the international line was fixed to run south of Vancouver Island along the middle of the channel which separates the Continent from Vancouver Island. Geography has a way of laughing at diplomats: there turned out to be three channels, each of which might fairly be claimed as the main channel.

It needs no subtlety of intellect to guess how the two peoples made their claims. Rosario, nearest the mainland, was Britain's choice; De Haro, nearest to Vancouver Island, that of the United States, and Douglas, between, was disowned by both. An American commander, General Harney, took possession with an armed force of the Island of San Juan, of which the Hudson Bay Company were in occupation, as British territory. British men-of-war were sent out and—there was no fight. A joint occupation was agreed to, and finally the question in dispute was left to the Emperor of Germany, who decided in favor of the American contention. And no one complains or feels aggrieved—unless it is the United States.

Almost exactly a hundred years after the beginning of that war, questions of considerable difficulty which had troubled the two nations for many years, came to be decided. This time a Board of Judges was chosen. Two were in fact Judges, an American and a Canadian, and the three others were lawyers of high standing. (I do not use the expression “Jurists of repute;” that has an ominous sound in the ear of a Canadian since 1903.) Their award was hailed with acclaim by all parties. Everyone felt that any settlement of our stand-

ing difficulties was better than keeping them alive as a source of irritation, and giving to the "lewd fellows of the baser sort" a pretext for international accusation.

During the intervening century all kinds of questions had been settled by all kinds of arbitrations; questions of boundary; of the amount to be paid for land taken by one government from the subjects of the other; for slaves taken by the warships of Britain from American citizens; where Americans might fish and what the United States should pay for Americans fishing where they had no right to; where Canadians might catch seals and what they should be paid for not being allowed to catch where they had a right to; what Britain should pay for her defective Municipal law, allowing the escape of the Alabama, and many more such questions.

And sometimes there was a single arbitrator, the Sovereign of a friendly state; sometimes two, one representing each party with or without a third to be chosen by lot or otherwise; sometimes five, two by each and a fifth by these four; sometimes five or seven, three to be chosen by foreign princes or potentates named. Sixteen arbitrations during that intervening time with half as many methods of selecting the judges; in all there have been twenty-one such references, all but a mere handful successful.

Not all the awards received the acclaim of that in 1910. Some were considered unjust; one at least was repudiated by both parties; but the discontent was of short duration and died out when the award was submitted. The American, when he complained of the Halifax award; the Canadian, when he complained of the Alaska award, consoled himself with the consideration, "I have been beaten in a lawsuit; the judges were ignorant or perverse, but at all events my opponent has not burnt my Capitol or slain my son." Patriotism itself—than which, says Pato, nothing is more cruel, and I add, more unjust—could not find a ground for international hate in a lawsuit lost.

This is a utilitarian age; we are all looking for results. Whence are the results worth having? From war, with its present blood and agony, destruction of property and of life,

suffering and sorrow, and its legacy of hatred and all evil, or from the determination of all disputes by peaceful means with consequent amity and good will?

Stopford Brooke said: "I am glad before I pass away to see the beginnings of a regeneration of Society. I am glad to believe that it will be wrought not by violence and revenge, but by patient work and ardent faith and hope; and that the stones of its temples will be cemented by forgiveness, their halls built by justice, and their foundations be the brotherhood of man in the Fatherhood of God."

So we in international matters have seen the beginnings of a regeneration working without violence; its halls built with justice.

The determination by the English-speaking peoples that they will conclude their disputes by peaceful means is final and irrevocable, and must in the nature of things have a tremendous influence upon the world at large. For the future of the world in no slight degree depends upon the English-speaking nations; all the others have more than they can attend to at home and can not be expected to take up the White Man's burden. The eye of the world is upon the United States and Great Britain. Where these lead the others will eventually follow.

No one desires or expects a political union, but there is a growing and developing and ever stronger sense of unity which must guide in future actions both peoples.

And is Manhood lost? or anything worth while?

I have elsewhere said: "Discordant notes are to be heard." Of course the "fire-eater" is not dead, or the pessimist, or he who can walk only per vias antiquas; while the fool we have always with us. We hear that wars are necessary to keep down population, although the same argument is not advanced for famine . . . that war is needed to awaken and keep alive valor and masculine virtues generally, although those who know most about war know best the absurdity of the argument: there is more valor in one day of attendance upon the sick in an epidemic than in a month of active warfare. I undertake to find ten men to face bullet or bayonet for every

one who will face smallpox or malignant fever. We are told that questions of national honor can not be arbitrated, and that if any nation were to fire a shot at a peaceful ship of another, war must ensue, although Britain did not suffer in the eyes of the world or in her own, because she submitted to international arbitration when her peaceful fishermen were shot down on the Dogger Bank; that a man does not go to law when someone assaults his wife, as though that justified him in stealing the other's fish—or as though the circumstance that some outrage might be so gross that law would be forgotten, furnished an argument against law in general.

All these objections will, in the long run fail, and the objectors will—must—suffer defeat. The brute, the tiger, must die, for what is war but a survival of the brute within?

Much better are the words of one now silent, whom that true son of peace, my friend Andrew Carnegie, calls "one of the purest, sweetest white souls that ever breathed."

T'was said: "When roll of drum and battle's roar
 Shall cease upon the earth, O, then no more
 The deed—the race—of heroes in the land."
 But scarce that word was breathed when one small hand
 Lifted victorious o'er giant wrong.
 That had its victims crushed through ages long;
 Some woman set her pale and quivering face
 Firm as a rock against a man's disgrace;
 A little child suffered in silence lest
 His savage pain should wound a mother's breast;
 Some quiet scholar flung his gauntlet down
 And risked in Truth's great name, the synod's frown;
 A civic hero, in the calm realm of laws,
 Did that which suddenly drew a world's applause;
 And one to the pest his lithe young body gave
 That he a thousand thousand lives might save.

(Richard Watson Gilder.)

Settlement of International Disputes

BY

HON. MR. JUSTICE WILLIAM RENWICK RIDDELL

From the Transactions of the Royal Canadian Institute, Toronto.

THE UNIVERSITY PRESS, TORONTO
1914.

SETTLEMENT OF INTERNATIONAL DISPUTES.

BY HON. MR. JUSTICE WILLIAM RENWICK RIDDELL.

(Read 28th February, 1914.)

In the following paper I propose to show the methods adopted for the settlement of their international differences by Britain (including Canada) and the United States, that is, the English-speaking nations, from the time of the substantive Treaty of Peace, signed September 3rd, 1783.

This treaty had, by Article II, fixed the boundaries of the new Republic; one of these was with reference to the source of the Saint Croix, while another was the middle line of the Great Lakes and connecting rivers.

There were two rivers either of which might fairly be called the St. Croix, and the two nations claimed respectively that as the true St. Croix which would give it the more territory.

Again, Britain continued in possession of the forts on the left bank of the waters (Dutchman's Point, Point au Fer, Oswegatchie, Oswego, Niagara, Buffalo, Detroit, Michillimacinac). This was because some of the States had passed legislation which prevented British creditors from recovering their debts from American debtors.

The Treaty of 1783 had by Article IV expressly provided that "creditors on either side shall meet no lawful impediment to the recovery of the full value in sterling money of all *bona fide* debts heretofore contracted." Notwithstanding this, the States refused to repeal the obnoxious laws, and the state courts held that these laws were binding. Many representations were made by the United States as to Britain remaining in possession of the forts spoken of; but they were told with the utmost firmness that Britain intended to remain in possession of the territory until redress should be granted to British subjects.

Some three thousand negro slaves had, during the Revolutionary War, come into the British lines relying on proclamations which offered freedom, and they accompanied the British forces on evacuation. The Treaty of 1783 by Article VII had provided that the British troops should not carry "away any negroes or other property of the American inhabitants." The United States demanded the return of the 3,000 negroes or payment for them. Britain replied: "The negroes became free when they came within British lines and were no longer property of the American inhabitants"; and refused either to give back the slaves or to pay for them.

In the terrible war which Britain carried on with France arising out of the French Revolution, she found it necessary to starve France out if possible; accordingly Orders-in-Council were passed to stop all vessels carrying food to France. Other restrictive orders were made, and as the British navy was immensely superior to any which could be brought against it, nearly all importation to France was stopped. Many American vessels suffered—indeed it was the American mercantile fleet which contributed most of the victims. The United States claimed the illegality in international law of these regulations. Britain answered—“Necessity”.

Feeling ran high in the United States, and measures were threatened in congress which would inevitably have resulted in war—and for war the United States could not be more unprepared. The ordinary means of negotiation having failed, Washington (April 16th, 1794) sent John Jay, Chief Justice of the Supreme Court, as envoy extraordinary, to negotiate a treaty with Britain if possible.

He succeeded, November 19th, 1794, in obtaining a Treaty, no doubt as favourable as could be had, but not containing everything which had been hoped for.

Britain absolutely refused to give any compensation for the negroes—and of this Washington made particular complaint. She refused all compensation for retaining the forts, saying that this was due to the fault of the United States. But the United States agreeing to pay the debts that British subjects had been prevented from recovering, Britain agreed to give up the retained territory by June 12th, 1796. Britain also agreed to pay American subjects for ships, etc., illegally taken. By this Treaty, which is the beginning of modern international arbitration, three matters were left to arbitration.

1. What is the River St. Croix? This by Article V was to be left to commissioners, one to be appointed by His Majesty, one by the President, and they to agree upon a third; if they were not able to agree, each was to propose one person, and one of these should be drawn by lot.

Britain named Thomas Barclay of Annapolis, a pupil of Jay's, who, born in New York State, had fought on the Loyalist side during the Revolution and attained the rank of colonel. He afterwards practised law in Nova Scotia, and became a member and Speaker of the Legislative Assembly. He was also for a time British Consul at New York.

The American Commissioner was David Howell, a Judge of the Supreme Court of Rhode Island; he suggested as the third Commissioner Egbert Benson, formerly Judge of the Supreme Court of New York, and afterwards a Judge of the Circuit Court of the United States. Colonel Barclay accepted Mr. Benson as a “cool, sensible and dispassionate third Commissioner”—no bad recommendation.

The three made a unanimous award at Providence, Rhode Island, in 1798, fixing the Schoodiac as the true river St. Croix, thus giving effect to the British claim, the United States having put forward the Maguadavic.

2. The amount the United States should pay for debts which British creditors were prevented from recovering, was by Article VI to be determined by five commissioners, two appointed by His Majesty, two by the President, and the fifth by the unanimous vote of these four; if they could not agree, the two commissioners on one side were to propose one person, the two on the other side another person, and of these two so proposed, one should be chosen by lot.

The British representatives were Thomas Macdonald and Henry Pye Rich; the American, Thomas Fitzsimons and James Innes. They could not agree on the fifth, and accordingly a lot was taken resulting in the selection of John Guillemard, of London, the nominee of the British commissioners. Colonel Innes, dying, was succeeded by Samuel Sitgreaves. The Board seems to have been at loggerheads from the beginning; faults of temper showed themselves, the reference was a failure and the Board dissolved.

The Governments, finally, in 1802, entered into a Convention whereby £600,000 was to be paid by the United States in full.

3. The amount due to American citizens for illegal seizures, etc., was by Article VII left to a Board of five commissioners selected in the same way. The British commissioners were Drs. John Nichol and John Anstey; one of the American was Christopher Gore, the preceptor of Daniel Webster, and at the time United States attorney for Massachusetts. He was afterwards Governor of Massachusetts and a member of the Senate of the United States. The other was William Pinkney, who had been a member of the Maryland Legislature and who afterwards became Minister to London, and Attorney-General of the United States. He was a man of great ability and sound judgment. These chose by lot Colonel John Trumbull the painter, as fifth Commissioner.

Dr. Nichol retired from the Board in November 1798, when he was knighted and became King's Advocate. Twenty-five years later he became judge of the High Court of Admiralty, having been in the meantime Dean of Arches and Judge of the Prerogative Court of Canterbury. He was succeeded on the Board by Dr. Maurice Swabey, also of Doctors' Commons.

Much delay took place in this arbitration, due chiefly to the trouble in that under Article VI; but when that was out of the way, the arbitrators speedily agreed, finishing their labours February, 1804. A sum of £2,330,000 or \$11,650,000 was paid by Britain on this head.

Jay's Treaty was received in the United States with execration by the party which was favourable to France and which was powerful in the House of Representatives. Jay was charged with selling his country, and was even burned in effigy. Rochefoucault, who travelled through the United States at the time, speaks of the hatred against Britain of the Americans and their confidence that the President (Washington) would not be hoodwinked into approving the Treaty. Washington waited long before ratifying the Treaty, and when at length he did so, after a secret vote by the Senate, he lost much of his popularity and was joined with Jay in the curses of a whole political party. This extraordinary outbreak of popular malevolence prevented Jay from obtaining the prize upon which he had set his heart—the Presidency. But time brings about its revenges; the Treaty which made him the best hated man of his time is now his highest title to immortality. It should be added that notwithstanding the feeling against it when it was negotiated, there was never any popular complaint against the results of the arbitrations provided for in the Treaty.

The war between France and Britain continued to do its evil work indirectly as well as directly. Britain was compelled to rely upon her navy for her very existence, and she could not get enough sailors to man it voluntarily. It is a part of the common law of England, as of all civilised countries, that his country has a right to call upon every man to defend it. It was, and is, law that every British subject may in case of need be forced into the navy as a sailor; hence the press gang with all its horrors. Again, by the common law of England—and by *Magna Charta*—no man may put off his allegiance. Many British subjects had joined American ships and some of these were become American citizens. Britain claimed the right of seizing these whenever she found them. The United States admitted that she might take them if she found them in her own waters; Britain admitted that she had no right to take them in American waters; the dispute was as to the high seas. Britain said: "The high seas are no man's land, therefore I violate no other nation's territory by seizing my subjects off American ships there". The United States said: "No man's land, and therefore my flag makes it mine for the time being." Britain had the power and she continually seized her subjects, former and present, on American ships on the high seas.

Probably this would not have been so much objected to; but the British commanders went further. They impressed hundreds of American citizens, claiming them to be British. Sometimes, perhaps, this was by mistake, it is too much to think it was always so. The captains had to have men, and they themselves were only men, and men to whom the salvation of their country was paramount to every other consideration.

This was a constant source of irritation and of negotiation wholly fruitless. Britain was in death grips with Napoleon and must have men.

Then in her war with France she closed the continent to all trade, (including the American) by Orders-in-Council, ruining American commerce.

The Americans—or some of them—believed, or pretended to believe, that Britain was stirring up the Indians on the West and North-West frontier, and the west was embittered against her accordingly. No one now believes that Britain was guilty of any such conduct. The enmity of the Indians was due to two causes: the one, inevitable, arising out of the advance to the West and North-West of settlement, the other which might have been, and by the British was avoided, that is the treatment of the Indians as inferior creatures unworthy of consideration or decent treatment; in short, treating them on the brutal principle laid down by one of the most celebrated of American generals—"The only good Indian is a dead Indian."

Canada was a tempting morsal, and, as it was thought, could be taken without difficulty. Which of these considerations were the real cause of the war declared in 1812 I do not stop to discuss; they were all talked of.

The war lasted two years and a half and decided nothing; the parties agreeing to the *status quo ante bellum*. Some American writers claim that impressment of American sailors was put an end to by the war. This is absolutely without basis in fact.

But the Treaty of Ghent, December 24th, 1814, furnishes other instances of arbitration.

4. From the time of the Treaty of Peace there was a dispute as to the Islands Moose, Dudley and Frederick in Passamaquoddy Bay. Negotiations went on for some time, and during the war of 1812 the British took possession of Moose Island. By Article IV of the Treaty of Ghent, it was left to two commissioners, one appointed by the King and one by the President, to determine the ownership of all the Islands in Passamaquoddy Bay.

The British commissioner was Colonel Thomas Barclay, whom we have already met; the American was John Holmes, afterwards a member of Congress and a Senator. They made an award, New York, November 24th, 1817, giving the three named islands to the United States, and all the others to Great Britain, and add: "In making this decision it became necessary that each of the commissioners should yield a part of his individual opinion."

5. In the Treaty of Peace, 1783, the boundaries of the United States were thus laid down: "From the northwest angle of Nova Scotia, viz., that angle which is formed by a line drawn due north from the source

of Saint Croix River to the Highlands; along the said Highlands which divide those rivers which empty themselves into the River St. Lawrence from those which fall into the Atlantic Ocean to the north-westernmost head of Connecticut River." We have seen that the "Saint Croix River" was identified by arbitration in 1798; but what were "the Highlands" remained a matter of dispute. In 1803 a commission to settle was agreed upon by Lord Hawkesbury (afterwards the first Earl of Liverpool) and Rufus King, the American Minister; but this failed of ratification in the Senate. In the negotiations at Ghent, the British Commissioners endeavoured to have the line revised; but this was not acceded to by the American Commissioners. It was agreed by Article V of the Treaty to leave this dispute to two Commissioners, appointed by the King and the President respectively. If the Commissioners could not agree they were to report to their Governments and the matter was to be referred "to some friendly sovereign or State". Colonel Thomas Barclay was again appointed by Britain; the American Commissioner was Cornelius P. Van Ness, subsequently Chief Justice and Governor of Vermont. They were unable to agree and so reported. We shall find the "Northeastern Boundary" cropping up more than once.

6. Another of the boundaries mentioned in the Treaty of Peace was thus stated: "Along the middle of said River (Iroquois or Cataraquy) into Lake Ontario, through the middle of said Lake until it strikes the communication by water between that lake and Lake Erie, thence along the said communication into Lake Erie, through the middle of said lake until it arrives at the water communication between that lake and Lake Huron, thence, etc." Disputes arose as to the ownership of certain islands and as to what was the middle of the several lakes and rivers; and this matter was left, by Article VI, to two Commissioners, one appointed by each side. The British representative was at first John Ogilvy, of Montreal; he died at Amherstburgh in 1819 from fever caught in the discharge of his duties, and was succeeded by Anthony Barclay, son of Colonel Thomas Barclay, already mentioned. The American Commissioner was General Peter Buel Porter who had made a good record as a soldier during the war of 1812, and was to be Secretary for War in Adams' Cabinet. They made an award at Utica, June 18th, 1822, which gave universal satisfaction.

7. The Treaty of Ghent by Article I had provided that "all territory, places and possessions whatsoever taken by either party from the other . . . shall be restored . . . without . . . carrying away of . . . any slaves or other private property." During the war many slaves had entered the British lines, most of them induced so to do by a Proclamation of Admiral Cochrane which in effect promised their freedom. The United States claimed the return of these slaves; Britain refused saying

that they were not slaves but free men. Much negotiation took place, and at length, October 18th, 1818, was signed a convention between the two countries, which by Article V provided that the question whether the United States were entitled to restitution of, or a full compensation for these slaves should be left to some friendly sovereign or State. The Emperor of Russia was selected, and he, April 22nd, 1822, made an award in favour of the contention of the United States.

8. Upon the award being communicated to the parties, they at once entered (July 12th, 1822) into a convention for carrying it into effect.

It was agreed, Article II, first to determine the average value of the slaves to be paid for. Each government was to appoint a Commissioner and an Arbitrator, and these four were to sit as a Board. If the Board or a majority could not agree, "recourse shall be had to the arbitration of the Minister or other agent" of Russia at Washington.

The British Commissioner was George (afterwards Sir George) Jackson, a diplomat of great experience; the arbitrator was John McTavish. The American Commissioner was Langdon Cheves, who had been a member of Congress, Speaker of the House and a Judge of the Supreme Court of South Carolina; the arbitrator was Henry Seawell, a Judge of the Superior Court of North Carolina. These four made a unanimous award, September 11th, 1824.

9. Article III of the Convention of 1822 provided that when the average value of the slaves had been determined, the two Commissioners should determine the number to be paid for. If they should not agree; they were to choose by lot one of the arbitrators. They failed to agree; and the Governments got tired of the delay and settled by Britain paying \$1,204,960 in full satisfaction (under a Convention November 13th, 1826.)

10. We have seen that the Treaty of Ghent provided by Article V that if the Commissioners should not agree as to the northeastern boundary, "some friendly sovereign or State" should be appealed to. We have also seen that the Commissioners did not agree. A Convention was entered into, September 29th, 1827, under which William, King of the Netherlands, was chosen arbitrator. January 10th, 1831, he made an award; the American Minister promptly protested against it, and the British Government did not insist. The line was afterwards settled by diplomatic negotiation by Ashburton and Webster, and is set out in the Ashburton Treaty of August 9th, 1842.

11. After the Treaty of Ghent, many claims were made against Britain by American citizens and many by British subjects against the United States. On the part of the United States were such claims as the wrongful seizure of vessels as slavers or for fishing in British waters,

seizure by British men-of-war after Treaty of Peace signed; duties wrongfully exacted, etc. On the part of Britain, seizure of vessel before war declared, arrest of British subjects, detention of vessels and other property, duties improperly exacted, dishonoured bonds of Florida and Texas, etc. These were agreed by Article I of a Convention entered into February 8th, 1853, to be left to the decision of Commissioners, one appointed by each Government, they to choose a third person to act as Arbitrator or Umpire. If they should not be able to agree, they were each to name one person and then select one of those named by lot.

The British Commissioner was Edmund Hornby, a barrister, afterwards Sir Edmund Hornby, Judge of the Consular Court at Constantinople and later Judge of the Supreme Court of China and Japan. The American was Nathaniel G. Upham, for some years a Judge of the Supreme Court of New Hampshire. They agreed on Martin Van Buren, former President of the United States, as Umpire, but he declined to act, and they selected Joshua Bates, an American by birth and allegiance, but carrying on business in London, as partner in the firm of Baring Bros., & Co.

They disposed of a great many cases, sometimes the two Commissioners agreeing and sometimes Mr. Bates being called upon. The awards against Britain totalled about \$330,000, against the United States \$275,000.

12. After the war of 1812, the question arose whether the United States had not forfeited by that war all right to fish within British territory. October 20th, 1818, the parties entered into a convention whereby the United States renounced all right to fish within three miles of British land except the Magdalen Islands, the coast of Labrador and a named part of Newfoundland. By Article I of the Reciprocity Treaty of June 5th, 1854, it was agreed that so long as the Treaty should last, the Americans should have the rights (or "liberties") given up by the Convention of 1818; but to prevent any dispute as to the places at which they should have the right to fish, a Commission was agreed to be formed. Each Government was to appoint a Commissioner, and they to choose an Arbitrator or Umpire; if they could not agree each was to name one person and one of these to be selected by lot.

Britain appointed M. H. Perley, of New Brunswick, the United States G. G. Cushman, of Maine; and the Hon. John Hamilton Gray of New Brunswick was selected Umpire by lot.

Mr. Cushman resigned pending the reference, and Benjamin Wiggin succeeded him; he, too, resigned and was followed by John Hubbard, and he by E. L. Hamlin. On Mr. Perley's death, the well-known Joseph Howe, of Nova Scotia, succeeded him. Very many rivers, streams, etc., came on for decision; there was much dissatisfaction on the part of the

United States with the Umpire, Mr. Gray, going so far as to suggest his removal on the ground of flagrant partiality; but on the whole the reference was successful.

13. There was for many years a dispute as to the boundary between the two nations toward the west. By the Convention of 1818, it was agreed that the 49th parallel should be the boundary from the Lake of the Woods to the Rocky Mountains. Britain west of the Rocky Mountains claimed down to the mouth of the Columbia between 46° and 47° ; the United States as far north as $54^{\circ} 40'$. By Article III of the Convention, it was agreed that west of the Rockies the disputed territory should, for ten years, be open to the vessels, citizens and subjects of either power without prejudice to the rights of each. In 1823 and 1826, attempts were made to settle the line, and the Convention of August 6th, 1827, indefinitely extended the period for common use; finally in 1846, Pakenham, the British Minister, accepted the offer made more than once, and the line of 49° was agreed upon. This was after Polk's election had been fought on the battle cry "Fifty-four forty or fight"; and war had been thought inevitable. The Treaty was concluded June 15th, 1846. By Article IV it was provided that the farms, etc., of the Puget Sound Agricultural Company to the north of the Columbia River should be confirmed to the Company, but that the United States might take them at a proper valuation. Article III provided that "the possessory rights of the Hudson Bay Company and of any British subjects . . . should be respected." These rights were not respected, and negotiations failed to fix the amount which should be paid. A Treaty was at length concluded, July 1, 1863, whereby these claims should be referred to two Commissioners (appointed by the Governments concerned), who should choose an Arbitrator or Umpire; if they could not agree the King of Italy was to appoint. The Commissioners were Alexander S. Johnson and Sir John Rose, the well-known Canadian financier and statesman. They selected as Umpire, Benjamin R. Curtis, who had been a Judge of the Supreme Court of the United States, and who gave the magnificent dissenting judgment in the Dred Scott Case; he was afterwards to be of Counsel for Andrew Johnson on his impeachment. September 10th, 1869, the Commissioners agreed upon an award without calling upon the Umpire, giving \$450,000 to the Hudson's Bay Company and \$200,000 to the Puget Sound Agricultural Company.

A very important treaty commonly called the Treaty of Washington was concluded May 8th, 1871, by which four matters in dispute were referred to arbitration.

14. The first of these was the "Alabama Claims": the United States claimed for the damage due directly and indirectly to Confederate cruisers built or equipped in British waters during the Civil War, chiefly

the Alabama, Florida, Georgia and Shenadoah. This was by Article I of the Treaty referred to five arbitrators, one to be appointed by the Queen, one by the President, and one by each of the potentates, the King of Italy, the President of Switzerland and the Emperor of Brazil. The English Commissioner was Sir Alexander J. E. Cockburn, Lord Chief Justice of England, the American, Charles Francis Adams, son of President John Quincy Adams, born in Boston, a student of Daniel Webster, called to the Bar but never having practised, a member of the State Legislature and afterwards of Congress, and Minister at the Court of St. James. The King of Italy appointed Count Frederic Sclopis, a distinguished judge, who became President of the Commission; the President of Switzerland, M. Jacques Staempfli, an advocate, who had been thrice President of the Swiss Confederation; and the Emperor of Brazil, Baron (afterwards Viscount) d'Itajubá, who had been a professor in the faculty of law of Olinda.

This Board met at Geneva, and, Cockburn dissenting, rendered an award, September 14th, 1872, allowing the United States the sum of \$15,500,000 as indemnity. The award met some criticism in England, but the amount was promptly paid.

15. There were claims distinct from the Alabama claims. A number of Confederate raiders had left Montreal and plundered the town of St. Alban's, Vermont; some daring Confederates had attacked American steamers on Lake Erie; vessels had been detained at Calcutta because laden with saltpetre, etc. On the other hand, there were British claims against the United States—detention of vessels, destruction of property or its appropriation by the United States, unlawful arrest, etc.

These were, by Article XII of the Treaty, referred to three Commissioners, one to be appointed by each Government, and the third by the Governments jointly; if they could not agree, then by the Spanish Minister at Washington.

The British Commissioner was Russell Gurney, Recorder of London and Judge of the Sheriff's Court; the American, James Somerville Frazer, formerly a Judge of the Supreme Court of Indiana; and the third, named by the Queen and President conjointly, Count Louis Corti, Italian Minister at Washington.

They disallowed all the American claims, and, September 25th, 1873, made a final award of \$1,929,819 in favour of Britain.

16. The next reference was of great importance. By the Convention of 1818, the United States had renounced the right to fish within three marine miles of British land, with certain exceptions. By the Reciprocity Treaty of 1854 they were given further rights so long as that Treaty should be in force; the Treaty was abrogated in 1866 and the United States were accordingly relegated to their position under the

Convention of 1818. The Treaty of Washington by Article XVIII restored these rights, but as they were claimed to be more valuable than certain rights given to British subjects by Articles XIX and XX, a Board of Commissioners was provided by Article XXII to determine the amount to be paid by the United States. This was to be composed (Article XXIII) of three Commissioners appointed, one by each party and one by them jointly.

Sir Alexander Tulloch Galt was appointed British Commissioner; John H. Clifford, the American, and on his death, Ensign Kellogg. M. Maurice Delfosse, the Belgian Ambassador at Washington, was appointed by the Queen and the President jointly. They met at Halifax, and, Mr. Kellogg dissenting, made an award November 23rd, 1877, of \$5,500,000 in favour of Britain. The result was a surprise to the United States; and there was some talk of repudiation, but the amount was paid within the year allowed by the Treaty.

17. The fourth matter in dispute agreed by the Treaty to be disposed of by arbitration has a rather curious history. By the Pakenham-Buchanan Treaty of 1846 the boundary was "the forty-ninth parallel of north latitude to the middle of the channel which separates the continent from Vancouver Island, and thence southerly through the middle of the said channel and of Fuca's Straits to the Pacific Ocean." With a not unusual irony of geography there turned out to be three channels, any of which might fairly be called "the channel": Rosario (or Vancouver's) Douglas and De Haro, in the order from east to west. Britain claimed Rosario, the United States, De Haro as "the channel", and much negotiation was the result. In 1869 a Convention was entered into to refer the dispute to the President of Switzerland; but this failed to pass the Senate. British subjects entered and settled on San Juan, one of the disputed islands. General Harney landed an armed force and took possession of it for the United States. Britain ordered out men-of-war to the spot; it was, however, agreed that the two nations should occupy the disputed territory jointly until the ownership should be decided.

By Article XXXIV of the Treaty of Washington, the question was left to the decision of the Emperor of Germany. That monarch, October 21st, 1872, decided in favour of the American contention.

18. Russia had, before the cession of Alaska, attempted to exercise rights of ownership in the Behring Sea which were protested against by both Britain and the United States. Not long after the cession, in 1867, of Alaska, legislation was passed by the United States which was interpreted as preventing the killing of fur seals in Behring's Sea. A little later the United States openly claimed the sea as its own, a *mare clausum*, although it is "a sea larger than the Mediterranean and the

gateway . . . 450 miles wide." As early as 1886, Canadian sealers were seized by American cruisers and their crews detained, some imprisoned and some turned adrift in San Francisco. As the place of seizure was sixty miles from land in the open sea, this was intolerable, and immediate and vigorous protest was made.

At length, after much negotiation and a renewal of seizures in 1889, it was agreed by Article I of a Treaty signed February 29th, 1892, that the questions which had arisen "concerning the jurisdictional rights of the United States in the waters of Behring's Sea" should be referred to a tribunal of seven Arbitrators, two to be appointed by each party, one each by the President of France, the King of Italy and the King of Sweden and Norway.

The British Arbitrators were Lord Hannen, Lord of Appeal in Ordinary and Sir John S. D. Thompson, Minister of Justice of the Dominion of Canada (he became Prime Minister pending the reference). The American Arbitrators were John M. Harlan, Justice of the Supreme Court of the United States and Senator John T. Morgan of Alabama, afterwards commissioned to frame a code for the Hawaiian Islands. The President of France appointed Baron Alphonse de Courcel, a senator of France, who became president of the Board; the King of Italy, the Marquis Emilio Visconti Venosta, a Senator of Italy; and the King of Sweden and Norway, Mr. Gregers Gram, a Minister of State.

These seven met at Paris in 1893, and, August 15th, 1893, made an award substantially in favour of the British contention. It is of interest to Canadians to note that Sir Charles Hibbert Tupper was agent, and our own Christopher Robinson one of the Counsel on the British side.

19. The amount of damages to be paid Canadians, etc., for wrongful seizure was not determined by this Board; but a Convention signed February 8th, 1896, left this to be determined by Commissioners. Each nation was to appoint one; and any case in which these two were unable to agree was to be left to an Umpire appointed by the Government jointly, or if they could not agree by the President of the Swiss Confederation.

The Commissioners appointed were George Edwin King, Justice of the Supreme Court of Canada, and William L. Putnam, a Judge of the United States Court of Appeals. They agreed on an award, December 17th, 1897, of \$473,151.26, which sum was paid forthwith by the United States. It was not necessary to appoint an Umpire.

20. The boundary between the United States and British territory by this time was well settled, except at Alaska—there, there was much uncertainty and difficulty. July 22nd, 1892, was concluded a convention for joint surveys of the line; but surveyors cannot decide matters of this kind. On January 24th, 1903, a convention was entered into for

the submission of the matter to "six impartial jurists of repute." Britain appointed Lord Alverstone, Lord Chief Justice of England; Sir Louis A. Jetté, Lieutenant-Governor of Quebec (formerly Chief Justice in that Province), and John Douglas Armour, Justice of the Supreme Court of Canada (previously Chief Justice of Ontario). Mr. Armour dying, Allen Bristol Aylesworth, K.C. (afterwards Sir Allen Aylesworth, Minister of Justice of the Dominion) was appointed in his stead. Elihu Root, Senator Henry Cabot Lodge of Massachusetts, and Senator George Turner of Washington were appointed on the other side. They met in London in 1903, and on the 20th October of that year made an award (the Canadian representatives dissenting, but Lord Alverstone joining in the award.)

This award created much dissatisfaction in Canada; few believed that Alverstone's action was judicial, most thought he acted as he did against his judgment, but diplomatically, so that there might be an award made. But Canadians resented still more—and chiefly—the constitution of the Board. Promised impartial jurists of repute, it was thought that two of the American Commissioners had expressed themselves in advance of their appointment in no uncertain terms upon the merits of the controversy—of one this was certainly true. This was not thought the "square deal" on the part of its most prominent and strenuous advocate.* The award, however, was submitted to without hesitation.

21. The Treaty of 1818, giving privileges to American citizens in respect of fishing in the Atlantic waters, drying and curing fish, etc., was not very definite; and constant friction showed itself between the two peoples. After many fruitless attempts at settlement, an agreement was entered into at London, April 4th, 1908, to refer the whole matter to a

* Hon. John W. Foster, once Secretary of State at Washington, who was the agent of the United States on this occasion, has the following in his "Diplomatic Memoirs" (1910) Vol. II, pp. 197, 198: "The Canadian Government complained to the British Colonial Office that the members nominated by the President of the United States were not such persons as were contemplated by the Treaty, to wit, 'impartial jurists of repute'; but the British Government did not regard this complaint of such a serious character as to bring it to the attention of the President. It was alleged that one of the American members had expressed himself publicly, some time previous to his appointment, as strongly convinced of the justice of the claim of his Government. It was also objected that no one of the three was taken from judicial life, and that they all might be considered as political rather than legal representatives of their country. The editor of Hall's 'International Law' (ed. 1904) refers to the selection of the American members as a 'serious blot on the proceedings'." Mr. Foster does not deny the charges made by the Canadian Government, nor does he attempt to justify or excuse the appointments, contenting himself with saying: "Whatever appropriateness there may have been in the objections urged by Canada, the sequel showed that the selection of the President was judicious"; adding a eulogy on the capacity and conduct of the American appointees. It is not without interest to note that Mr. Foster says nothing of the appointment of Mr. Justice Armour as a British representative.

I have never heard the conduct of President Roosevelt in this matter justified by an American; it has been explained (I cannot say how truly) by the alleged fact that it was only on the understanding that such appointments should be made that the Senate's approval of the Treaty could be obtained.

tribunal of arbitration chosen from the general list of members of the Permanent Court at the Hague, Article V. There were chosen George Gray, of the Circuit Court of Appeals; Sir Charles Fitzpatrick, Chief Justice of Canada; Dr. H. Lammasch, of the University of Vienna and an Aulic Councillor, Jonkheer A. F. De Savornin Lohman, of the Netherlands, and Dr. Luis Maria Drago of the Argentine Republic. They met at the Hague in 1910 and made an award unanimous in all respects (except that Dr. Drago dissented on one point.)

The award gave complete satisfaction to both parties, so much so that each nation claimed a victory. The fact is that both were weary of the strife over the fisheries which had been going on for over a century, and any settlement with a semblance of fairness would have been acceptable. It should be remembered, too, that most of the international hatred and contempt of some section of either nation for the other had in great measure died out.

There is another arbitration which was in fact, though not in form, between the two English speaking peoples, and has a claim to be mentioned here.

In 1814 Britain acquired from the Netherlands the Province of Demerara, Essequibo and Berbice (British Guiana), and almost at once got into a dispute with Venezuela as to the boundary between the countries. Venezuela finally claimed to the Essequibo River, though she had previously insisted on a more favourable line. In 1840 Britain directed Sir Robert Schomburgk to lay out the boundaries, which he did, taking in a large area claimed by Venezuela. Much controversy ensued. Schomburgk's monuments were taken up by Britain, but in 1886 she returned to her claim of the line of 1840. More controversy took place, and in 1894 Venezuela took possession of the disputed territory by an armed force. Next year British police removed the Venezuelan flag and were arrested but subsequently released. Then the United States interfered and the celebrated Cleveland Message was sent, December 17th, 1895.

22. In the event, a Treaty was entered into, February 2nd, 1897, between Great Britain and Venezuela to leave the dispute to four Commissioners named in the Treaty, and a fifth to be selected by these four, and if they disagreed, by the King of Sweden and Norway, the fifth to be President of the tribunal. The British Commissioners were Lord Herschell, shortly before Lord Chancellor; and Sir Richard Henn Collins, then a Justice of the Supreme Court of Judicature and to be Master of the Rolls. The Venezuelan, Chief Justice Fuller and Associate Justice Brewer, of the Supreme Court of the United States. They chose M. de Martens of St. Petersburg, a distinguished Russian jurist, professor of International Law in the University of St. Petersburg, and an eminent legal writer, as the fifth.

An award was made October 3rd, 1899, which gave Britain practically what she claimed—in some respects more.

There was considerable anger expressed in Venezuela, but it met no echo in the United States. Perhaps the fact that the notorious Castro began his obnoxious career about the same time had something to do with this complaisance; but it is probable that the Spanish war (which began 1898) and the good-will then manifested towards the United States by the Mother Country had more.

There is still another settlement of a dispute which should be mentioned—a dispute not international but interprovincial.

By the British North America Act (1867), the Province of Ontario was given the same limits as the former Province of Upper Canada. In 1870, by the Dominion Act, 33 Vic., c. 3, the Province of Manitoba was formed with its eastern boundary at the meridian of 96° W.L. At once there was a movement in Ontario, the Government of that province claiming that it went further West than 96° W.L., although this had long been considered in fact about her western limit. Many communications passed between the Governments, but without result. Then in 1876 an Act was passed (39 Vict., c., 21), extending the limits of Manitoba to the "westerly boundary of Ontario". The Dominion and Manitoba claimed that the westerly boundary was about six miles east of Port Arthur. Armed forces of the Provinces of Manitoba and Ontario took possession of Port Arthur, but the scandal was abated by an agreement to arbitrate, December 18th, 1883, by the Dominion and Province. Ontario named William Buell Richards, Chief Justice of the Province, and when he became Chief Justice of Canada, his successor Robert A. Harrison; the Dominion, Sir Francis Hincks, and the two Governments jointly Sir Edward Thornton the British Ambassador at Washington.

These Arbitrators made, August 3rd, 1878, a unanimous award in favour of the Ontario contention, which by this time was in reality limited to the generally recognised boundary. This was at once accepted by Ontario, but the Dominion refused to ratify the award. At length, in 1883, the two Provinces concerned agreed to submit to the Judicial Committee of the Privy Council three questions: (1) whether the award was binding; (2) if not, what was the true boundary, and (3) what legislation was necessary to make the decision effectual.

The Judicial Committee, August 11th, 1884, decided (1) in the absence of Dominion legislation the award was not binding, (2) the award laid down the boundary correctly, and (3) Imperial legislation was desirable (without saying it was necessary).

The Imperial Act (1889), 52 and 53 Vic., c., 28, carried the decision into effect, and ended the controversy.

Thus far particular treaties, conventions and agreements for settlement of disputes have been spoken of; it will not be without interest to say something about the general agreements between Britain and Canada on the one hand, and the United States on the other. I quote from an article written by me in the *Yale Law Journal*, June 1913:

"In 1908, April 4th, a general Treaty of Arbitration between the United States and Great Britain was signed at Washington. This provided (Article I) that differences which might arise of a legal nature or relating to the interpretation of treaties existing between the two contracting parties, and which could not be settled by diplomacy, should be referred to the permanent Court of Arbitration established at the Hague by the convention of July 29th, 1899, provided they did not affect the vital interests, the independence, or the honour of the two contracting States, and did not concern the interests of third parties.

"Article II provides that in each individual case the parties were to conclude a special agreement defining the matter in dispute, the scope of the powers of the arbitrators and the times to be set for the several stages of the procedure.

"A provision of very great significance to a Canadian appears in the Treaty. The British Government reserved the right before concluding a special agreement in any matter affecting the interests of a self-governing Dominion of the British Empire to obtain the concurrence therein of the Government of that Dominion.

"This was not, indeed, the first time the concurrence of the colony had been provided for; in the Treaty of Washington (1871) it was provided that certain parts of the Treaty were not to come into force until legislation had been passed by the colonies concerned."

It was under this general Treaty that the Hague arbitration (21 above) was held.

This Treaty, it will be seen, applies to the whole British Empire: but there is another international arrangement which (as I said in an address at Washington some years ago) "may be called a miniature Hague tribunal of our own just for us English speaking nations of the Continent of North America."

This "Treaty of 1909 was preceded by the constitution of a board of commissioners. The board was formed at the request of the President, acting under the authority of the River and Harbour Act approved June 13, 1902. The functions of the proposed board were defined in the Act, and were substantially a full investigation of the question of the boundary waters; the board was to consist of six members, three appointed by the United States and three by Canada. The President, July 15, 1902, communicated through the American Ambassador at London with the British Government, that Government transmitted

the invitation to the Government at Ottawa, the Canadian Government accepted the invitation, and this acceptance was communicated to the American Government. The American part of the board was appointed in 1903, and the Canadian in 1903 and 1905; and work was begun with all convenient speed on the Sault Ste. Marie Channel, the Chicago Canal, the Minnesota Canal, etc. This board has done an immense amount of very valuable work already.

The Treaty of 1909 was really at the instance of that Board."

Signed January 11, 1909, this "Waterways Treaty" provides "for the establishment and maintenance of an International Joint Commission of the United States and Canada—three appointed by each Government—which Commission should (Article VIII) have jurisdiction over and pass upon all cases involving the use, obstruction or diversion of the waters between the United States and Canada. But Article IX contains an agreement that all matters of difference between the countries involving the rights, obligations or interests of either in relation to the other or to the inhabitants of the other along the frontier shall be referred to this Commission for inquiry and report. Article X provides that any questions or matters of difference involving the rights, obligations or interests of the United States or of Canada, either in relation to each other or to their respective inhabitants, may be referred for decision to this International Joint Commission. If the Commission be equally divided, an Umpire is to be chosen in the manner provided by Act 45 of the Hague Convention of October 18, 1907."

It will be seen that "every dispute involving the rights, obligations or interests of the United States or of the Dominion of Canada either in relation to each other or to their respective inhabitants" may be referred to the Commission by the consent of the two countries.

"It is hard to see how a more comprehensive clause could be framed; and if the Treaty had provided that such dispute 'shall' be referred, the work would be perfect. As it is, the Dominion must give consent through the Dominion Cabinet. That is an easy task. We have a Government which is united—it must be united or it could not stand—and which in this instance does not need to go to Parliament for authority."

It is not always the case that a Canadian Parliament will consent to an international agreement made by the Government; then the Government must take the opinion of the electorate (a recent example will occur to everybody), but in this instance the Government may act without the consent of Parliament.

"But in the United States the action must be by and with the advice and consent of the Senate; and sometimes, as it is well known, trouble arises in the Senate about confirming treaties.

Each reference to the Commission will or may be but equivalent to making a new treaty. Had the provision been that the consent might

be given by the President of the United States, the position of all the parties on the two sides would have been much alike.

Better even than this would be a provision making the arbitration of the Commission apply automatically. If such a provision proved unsatisfactory, the treaty could be denounced and a new treaty negotiated. But I suppose there may be some jealousy on the part of the Senate, or perhaps the Constitution prevents. And we Canadians notice that the Constitution of the United States prevents a great many things being done over which we should have no trouble at all."

The Rush-Bagot Convention of 1817 cannot fairly be called an agreement of the kind we have been considering—it was designed to prevent troubles arising, not to settle them after they had arisen. It may be well, however, to say a word about it here:

"During the war of 1812, much damage had been done by armed vessels upon the Great Lakes. The Treaty of Ghent did not provide that such armed forces should not be kept up; but it became apparent to both sides that it would be well strictly to limit the number and quality of armed vessels upon the fresh waters between the two countries. After some negotiation notes were interchanged, April 28th and 29th, 1817, containing the 'Rush-Bagot Convention,' which notes contained an agreement by one and the other party limiting the naval force to be kept on the lakes to a very few: on Lake Ontario one vessel, on the Upper Lakes two vessels, on Lake Champlain one vessel, none of the vessels to exceed one hundred tons burden, and each to have but one cannon of 18 pounds. It was agreed to dismantle forthwith all other armed vessels on the lakes, and that no other vessels of war should be there built or armed; six months' notice to be given by either party of desire of annulling the stipulation.

"The arrangement was after some delay submitted by the President to the Senate, and that body in 1818 approved of and consented to it."

This understanding has continued up to the present time—perhaps not always so strictly observed as might be desired.

"The understanding was, however, in great danger in 1864. The Minister of the United States in London was instructed in October of that year to give the six months' notice required to terminate the agreement; and Mr. Adams did so with the subsequent approval of Congress. Before the lapse of the time specified, however, matters on the lakes had taken a different turn, and the United States expressed a desire that the arrangement should continue and be observed by both parties. This was acceded to and all parties thereafter considered the convention to be in full force."

I say nothing of treaties which have been negotiated and have failed of ratification, or of negotiations which proved fruitless even diplomatically.

The Adventures of a German Hunter in America



Translated from the German

By HON. WILLIAM RENWICK RIDDELL, L.H.D., etc.

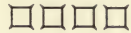


*Rod and Gun Press,
May 1913.*

The Adventures of a German Hunter in America

Translated from the German by Hon. William Renwick Riddell, L. H. D., etc.

Friedrich Gerstaecker, born in 1816 at Hamburg, sailed in 1837 for America on the "Konstitution." After remaining a short time in New York, he went up the Hudson to Albany and then by the Erie Canal westward. He spent a few days in Canada and then went west and south.



A Bear Hunt in the Ozark Mountains in '38

WE were very glad to reach shelter, and had hardly got our feet out of the stirrups before we heard good news. Some Cherokees hunting there in the mountains had discovered a hole in which there certainly was a bear hiding, but they had not ventured to go far into it as it was so long and narrow. This was "water for our mill." The skin and meat of the deer we had shot were placed in safety, our guns fired off and cleaned, the horses foddered and we now prepared ourselves for a regular hunt. We spent the evening telling bear stories, Old Conwell entertaining us with an interesting description of their winter sleep.

"In this somewhat southerly latitude the bear as a rule goes into his hole about Christmas or the beginning of January when the cold weather commences. If the weather is mild he comes out now and then, and remains out altogether; he prepares a lair for himself in a thick bush biting off and bringing together twigs for that purpose. He seeks the roughest and wildest places seldom trod by human foot.

If he goes into his hole, he lies there without taking any nourishment; but when he is not sleeping, he sucks his paws and at the same time makes a whining sound. This sucking of his paws is only to pass the time away and not at all for nourishment, for blomed little fat can he get out of them. Children suck their thumbs, too, you know. When he falls at length into his winter's sleep, he lies with his belly and forehead on the ground so that his nose is pressed against his breast and both his forepaws lie together over his head."

My old friend assured me that he had crept into holes and poked the bears with the barrel of his rifle to make hem move and raise their heads up so that he was able without difficulty to shoot them through the brain.

The bear, as the story goes, is very cowardly when in the hole, except when accompanied by young. In this case, the beast will often fight; but even then, only when it has no other choice. On very warm days it leaves its hole to drink; it goes however, to the nearest water, and it is remarkable how accurately it keeps always to the same path. When a bear is living in a hole and goes often to a stream, the hunter easily finds his track as it becomes deep and plain by the bear always following the same trail. This trail the hunters call "stepping-path."

When it got late, we lay down to get a good rest for the next day's work. During the night, it became bitterly cold—and we got the finest day for hunting that anyone could wish for. With us went a married son of my old friend who was living in the vicinity; also a young man by the name of Smith; and as we rode past the schoolhouse, the school master sent away the boys and girls and insisted upon accompanying the hunting party. We had brought along split pine to make torches with, and young Smith acted as guide, as he was one of those who had followed the bear, but had not ventured any further than the Indians.

At two o'clock in the afternoon, we arrived at the spot, and we prepared a good dinner to strengthen ourselves somewhat for the expected exertions. While the meat was broiling by the fire, I took a look around the outside of the hole. It was a steep wall of limestone rock about thirty feet high and perhaps three hundred feet long, and it had four distinct openings or entrances, making one of the most curious works of nature, I, at least, have ever seen.

After we had refreshed ourselves sufficiently, we made ready to enter the hole. We took only one rifle with us as we had to creep along in Indian file; and

in that rough hole one might easily receive a wound through the discharge of a rifle. Everyone carried in his belt his great hunting knife, and I buckled on my powder-horn close to the body. With rifle in the right hand, and a torch of split pine, at least twenty inches long, in the left, I entered the dark passage which led into the mountain. This was perhaps four feet high and two wide. Behind me came young Conwell and then old Conwell, the latter carrying a bundle of fine-split pine to renew our torches in case they burned down. The passage was in the solid rock and we went without difficulty seventy or eighty paces; then we made a sharp turn to the right and we had to get upon our knees in order to go forward at all. The floor which thus far was of rock now became softer; it consisted of clay, and exhibited very plainly bear tracks of which one was particularly fresh, and from its appearance could have been made only a few hours before. The further we forced our way in, the narrower the passage became; and soon we had to crawl forward upon our bellies. This far the Indians had come, for we found several pieces of pine and we also noticed the impressions of their knees and elbows in the soft earth—beyond this point, however, there was no trace of them.

The passage way now became so confined that I had to force myself through the narrowest clefts, dragging forward with the left elbow, shoving behind with the feet and lying flat on the ground, holding at the same time the torch in the left, the rifle in the right hand. Curiously enough, the hole at this point was almost round and the walls on each side were rubbed so smooth and black that they looked actually greasy. This could have happened only through the creeping in and out of wild animals which had for centuries made use of the cavern for sleeping and winter quarters.

Stalactites hung down from the roof everywhere; and these also hindered progress forward, as the free space in a few places was no more than two feet high; and there were several places where I could make my way through only with the utmost exertion.

It was obvious that we were the first white men who had forced their way into this chamber of horrors, for the soft floor showed plainly every track which had been impressed into it for many years: we found, too, in many places even petrified bear-tracks which had

been imprinted perhaps many centuries before in the clay which was then soft. The thought certainly struck me at one time to turn back lest we should not be able to return and must perish there in that grave: but I had my rifle and so I crept on with all my thinking apparatus devoted to the one object of finding the sleeping bear.

Very noticeable was the great number of bats which everywhere hung by their legs from the roof and who, disturbed by the fire of the torch close under them, set up a shrill cry almost like the noise of a rattlesnake. Crickets were found too in great abundance as well as a few bluebottle flies.

My torch was about burned out as I had brought only a few slivers so as to save pine: so I now stopped so that the man following me might pass me a few slivers. While I was resting quiet for an instant, it seemed to me that I heard not far away a light whimpering—"hush"—everything was still as death and now I distinguished clearly at a short distance the sound which young bears make in sucking. At the same time there was to be heard a low growling, and there was no longer any doubt that we were drawing near to the den of a she bear with cubs.

Just then I found myself in a somewhat roomier place where I could rise half erect, having chosen to rest here a moment—so I turned round to the Conwells and asked them if they had heard the noise. They whispered "yes;" and we held a short council of war as to what course we should now pursue.

In the first place the passage began to be so narrow and uncomfortable that we could force our way in only with the most strenuous exertions, and then we had counted on a sleeping bear, not a waking she-bear with cubs. It was, in reality, almost too early in the season to expect a bear with cubs; but afterwards my old friend assured me that in Arkansas he had come across young cubs as early as about New Year's day. However, it made no difference.

Whoever has ever seen a she-bear with ears laid back and jaws wide open defending her young may have some slight conception of how we felt. We had all three of us been on a bear hunt, and knew quite well what danger we ran in that contracted space, which forbade all movement. But there we were—and so was the bear; and no one was coward enough to hint at going back. I ex-

aimed my rifle to see if everything was in perfect condition, and as I went slowly forward again, the old man gave me warning to make a sure shot.

Nearer and nearer we came to the growling bear, who must have heard us long before and was now for certain listening with strained ears. At last I came so close that the whining of the cubs and the threatening growl of the old bear seemed close in front of me; and holding the torch behind my head, I saw distinctly her glowing eyes.

Then I stopped, cleaned the sight of my rifle in which some clay had got placed, stirred up the torch and without venturing to make any further noise I crept forward toward the black mass which I could now distinguish clearly.

The decisive moment seemed come; and as I saw the head of the animal shining out from the surrounding darkness, I began my preparations for a shot from a favorable position.

The bear had raised herself up from her lair; she was sitting with the usual oscillatory motion upon her hind-legs, and I was just trying to draw a bead upon one of her eyes when she suddenly rose and at once disappeared into the darkness lying behind her, a darkness which could almost be felt.

Arrived at the lair, we found three cubs, splendid little things, which cried out lustily when they saw the light, to which they were unaccustomed, and indeed had never seen before. It was certainly not without ground that we feared that the cry of her young would rouse the old bear to a frenzy; we desired, however, to take them alive and keep them; and so we asked the elder Conwell to stay by them and soothe them, and at the same time to keep up a light while the other two of us pressed forward and tried to kill the old bear. Conwell was content to do this; he bent down beside them and put his finger into their mouth. They began eagerly to suck on the finger and soon he had them quieted.

Not ten feet from the lair, the passage divided into two openings of equal size to the right and left. Here, however, the soft floor showed a track in the right hand opening, made only a few seconds before—and accordingly we followed this track.

The cry of the cubs which in a short time was renewed with greater force began to be ominous for us, for we should have been in very evil case had the bear

desired to go to the assistance of the young and found the way barred by our bodies. Certainly there would be nothing left for her at that place, at least, where we found ourselves, than to kill us and "eat her way through" in the literal sense of the words—for she could not with the best will in the world have got over us or under us. When we were consulting under our breath what we should do, the cry suddenly ceased, and we again went noiselessly forward with fresh courage in our breast. From all we had so far seen of the bear, she must be very cowardly; and that was a consolation. The hole, however, seemed to have no end and we crept and shoved ourselves further and further through the rough rock to the detriment of elbows and ribs.

This cavity had one peculiarity which I never found in any other, I mean the flat stones of about one to two inches in thickness, running along the inside like shelves, and giving out a sound like steel if struck lightly with the finger. One place, perhaps forty or fifty feet long was of most extraordinary construction. Flat stones such as I have spoken of ran along on both sides, and projected within six inches of each other, so that you could creep along almost in a sitting posture, shoving the neck between the two shelves with the head in the space above. But in the process, for this short space at least, the head and the body were in separate compartments, which was, to say the least, a highly uncomfortable condition, especially if the bear should attempt to make an attack under such circumstances.

When at length we had made our way through this pass, we came to a spring which ran for a short distance along the passage, and then disappeared to the right—and surely it was in this place for the accommodation of Mrs. Bear alone. The spring had washed out a channel perhaps eighteen inches deep and eight to nine inches wide; and with one foot in this channel we went forward much more easily.

After I had again worked my way through a place, more than uncomfortable, and was drawing as deep a breath as the narrow passage allowed, suddenly I heard the deep growl of the beast and, as it seemed, quite close to me.

Although I had for several hours and at every step been watching for and expecting this very growl, the sudden

sound close in front of my nose started me, so that I nearly let the torch fall. But I soon recovered my equanimity; and holding the torch as high as possible (to the great discomfort and dismay of some innocent bats) I got a clear view of the bear not ten paces from me, sitting upright, snapping her fangs, scratching with her sharp claws the ground in front of her and seeming to be in the very worst humor in the world.

Young Conwell who was close behind me now laid his hand on my foot and whispered to me that he saw the bear. As I had already seen her, I beckoned him to keep quiet, and creeping forward a few paces further, I came to a place from which I believed I could shoot.

I let my right foot down into the channel worn by the spring, raised myself up on the left knee as well as I could, and raised the rifle.

My rear rank man, who had watched most anxiously all my movements, warned me for God's sake to aim carefully, for if I made a bad shot we were both "goners." Although I was nearer the danger than he, I would not have changed places with him for as he could not see the least thing of what was going on, he of course always feared the worst—and I would rather under such circumstances be exposed to a danger approaching most closely than be in a constant state of suspense and uncertainty.

The bear did not at all enjoy my approach; she snapped around and her eyes glowed like fire; with her short ears laid back, she moved her whole body from side to side in disquiet. As she was sitting somewhat bowed I had no other choice than to shoot at the head, having the hope that if I missed the head, the bullet would in any case pierce the breast. While I was lying there aiming for a moment (why should I deny it?) the thought passed through my mind how helpless I would be, hemmed in as I was, in case the shot missed—and the recollection of the dear ones at home came over me with the speed of thought. This was only for a moment, and in the excitement of the present, I forgot past and future. My aim was long, as the bear did not stay still a second; but still the finger pressed the trigger too quickly. In an instant thick smoke filled the cavity, and a piteous groaning showed that the bear was wounded. We did not take time to investigate more closely but crawled

back as quickly as the narrow space permitted, so as to get to a higher place where we could reload the rifle and return to the field of battle.

We had not crawled thus crab-fashion, a hundred paces, and I had just found a place such as was required, when I heard the wounded animal snuffing and snorting and gnashing her teeth so that the sound came echoing through the hole.

My first thought was "Good bye, daylight." I had not much time for deliberation and called quickly to young Conwell to hurry if he thought anything of his life and mine, for the old girl was coming. It was quite unnecessary to urge him further—I never saw a crab crawl backwards more quickly than we now did in our endeavor to get out of that place. But no matter how we hurried, and no matter how near the danger came, our retreat went but slowly, and nearer and nearer came the snorting.

I had already been forced to leave behind the empty rifle as it hindered my progress, and I was continually looking in front where I always expected to see the bear, when suddenly I observed her glowing eyes only a few paces away. At that very instant, I struck my left elbow against a projecting point of rock—the torch fell from my hand and pitch-dark night immediately ensued. Young Conwell had another lighted torch but my body filled the space so completely that no ray of light could make its way past me.

Almost involuntarily, and as with a kind of instinct, I threw the yet smouldering fragments of the torch at the bear. This must have disconcerted her for she stopped suddenly. This did not continue long; all too soon I heard her again come on.

All of a sudden, young Conwell stopped short: and swore he would be damned if that was not the end of the passage for he could not get any further. At the same time, his right hand which held the torch slipped into the spring, and Egyptian darkness was the immediate result.

I had no time to answer him, for the bear who was slowly following our retreat as though she knew we were doing our best to get out of her way, was now close in front of me; and I am convinced that I could have laid my hand on her if I had stretched out my arm. I could feel distinctly the beast's hot breath in my face; and with my broad hunting knife closely clasped in my right hand.

I waited expecting with every pulsebeat the attack of the wounded animal. The danger was too near not to lose its terror; and at the moment I thought of nothing else than to sell my life as dearly as possible. I had no hope ever to get out of this pass.

Young Conwell was not idle during this time but he had quickly felt for flint and steel, knowing well that we could not do without light. The stroke of steel against flint was now the only sound which broke the dead stillness for at the first blow the bear had stopped sniffing, apparently to listen to the strange sound.

After a painfully anxious interval, Jim (young Conwell) called out at length, "I have got a light, give me the powder horn and a bit of rag." I cut the cord of the first, tore off a piece from my hunting shirt and handed both back: in a few minutes the pine had caught.

Hope sprang anew in our breasts—or rather in mine, for Jim had feared little or no danger. In the first place he did not know how near the bear was, and then he had been so busy in striking a light that he (as he afterwards assured me) had thought of nothing else than to get a light. Moreover he had succeeded in turning round, and the cry that he had found the right opening sounded to me like the song of an angel.

He had now the advantage that he could crawl forward, while I had to keep face to the bear: but he reached me a few splinters of burning pine and we moved slowly to the entrance of the cave.

When I held the torch in front, the bear growled and went a few steps backward gnashing her teeth: but she followed us again when she saw we were retreating. "Necessity is the mother of invention," I laid a few pieces of burning pine on the floor and saw with inexpressible pleasure that she stopped at them and did not venture to pass. With, if possible, even greater haste we scrambled to the place where we had left the elder Conwell by the cubs. Jim reached the place before me and I heard him yell to his father, to crawl away back as the bear was coming.

Not another syllable was uttered—in fact the sniffing and snorting was coming nearer again. Apparently the flame had gone out on the moist floor and she had found nothing else to hinder her from following us.

I now, following the two Conwells, crept over the place where she had had

her lair. And there I discovered why the cubs had so suddenly ceased their outcry when we stopped in the hole, undecided what to do. The old man had smashed their skulls against the rock wall, apparently in that way saving our lives; a single cry of the cubs when our torches were out would certainly have maddened the wounded beast.

I stopped about a hundred yards from the lair to listen; but I did not hear the slightest sound. I called to the others to wait for me, and when we had got to a fairly roomy spot, where an old bear had had his bed, we held a short council of war, crouched down together in that narrow place.

Old Conwell thought that the bear had returned to her young and had lain down by the slaughtered animals; and that one of us should crawl to our camp in front of the cavern and get another rifle, for it was quite impossible to get past the beast angered and wounded as she was, to get my rifle again. I made up my mind, however, that before I would crawl the long and uncomfortable way back to our camp, I would creep once more to the bear's lair and see if she was not dead. I could not think that my bullet had had such slight effect. When I got there, however, I did not see the faintest trace of the wounded creature.

My cry brought the others; we examined the place carefully, moving a little forward and following the marks of the blood which lay thick and dark red upon the floor. We found that instead of returning to the old bed, she had followed the opening to the left.

My gun lay over three hundred paces away in the right passage and it was necessary for me to crawl there for it. It was covered with mud and blood; I returned as quickly as I could and cleaned and loaded it. There was no use thinking of resting, we were all so excited—we started forward anew to finish the fight we had begun.

The left-hand opening was just as hard to walk through—or rather to crawl through—as the right; but fortunately the bear had not retreated so far, and we soon reached the spot where she was at bay and was awaiting us, raging and biting around her.

When almost on her—I could not have been more than eight or nine feet away—I stopped, raised myself as much as I could in the passage, laid the rifle on my left wrist (I was holding the torch in

that hand) and fired at the instant that she held her head still, though, but for a second. The heavy crash of the rifle echoed through the cavern and everything was hidden in thick smoke.

I certainly heard the bear moving and groaning; but I held my ground because I knew that this time my ball had reached the right spot; and when the smoke had lightened, there she lay dead not three yards in front of me. Young Conwell and I were ourselves nearly dead; and at that time to drag the beast out would be simply an impossibility. Crawling round in the heavy air of the cavern and in the pine smoke as well as the terribly exciting situation of constant danger for so many hours had been too much even for our hardy constitutions and had so exhausted us that we determined to get to the fresh air as quickly as we could and to take a complete rest there.

It took us about half an hour to reach the exit. I shall never forget the impression the cold fresh night air made upon me as I inhaled in long eager draughts the balsamy odor of the open woods and looked at the blue starry sky once more.

Our schoolmaster and young Smith were fast asleep but, wakened by the barking of the dogs, they both sprang up—they were nearly killed with fright for, as they swore, they never in their lives had seen such figures as we three presented, standing there before them in the ruddy glare of our pine-torches, covered all over with mud and blackened beyond recognition by the pine smoke.

By the stars it appeared to be about two o'clock in the morning, so long had we been knocking around in the hole; and though we were hungry as lions, we were too exhausted to enjoy food.

The two woke us at daybreak. We took a fairly good breakfast, and leaving this time the old man behind as he had exerted himself beyond what was warranted by his years, the four others of us went into the hole with a rope to bring our booty out to the daylight. We fastened the rope round the bear's neck and I forced myself in behind her and shoved while two of the others pulled and Jim held the torch. In this way we moved inch by inch, and it was mid-day when we threw the bear with a hurra, in which all joined, down the slope to our camp fire where my dog Bears-grease at once took possession of

her and laid himself growling down beside her.

(Gerstæcker then describes the homecoming and his return to the hunt.)

I had discovered another small opening and found fresh marks; the bear must, however, have gone to drink or exchanged this place for a better for I could see nothing of him. I went in front of the entrance to listen for a sound when I distinctly heard our dog and I found after a few moments' careful listening that they were coming straight for me—louder and more distinct sounded the crashing of the old branches and suddenly I saw a bear break out and dart forward.

Rushing down a little slope about ten feet high, he came straight towards me fast as his legs would carry him. I stood quite still to see how near he would come. When he was about fifty paces away he got wind of me and stopped short in his rapid course, sniffed in the air for a moment and then turned and shot away from me like an arrow. This moment sufficed for me to send a bullet after him; but I was too excited and heated and my lead struck him only in the ham and broke his hip-bone. In the meantime the dogs had been halted by the slope down which Bruin had bolted; and thereby he had won quite a lead, but the loss of one hind leg hindered him much in his flight and soon I heard him striking back the dogs which had overhauled him.

A young man by the name of Erskwine who was hunting not far away, attracted by the sound of my rifle and the baying of the hounds, came up at the right time to give him the fatal shot and soon he was no more.

Erskwine told us that he had himself found a hole in which he was satisfied a bear was lying; and said if one of us would go with him he would make the attempt to get the bear. He added that he was just on his way to the nearest pine-wood to prepare a torch as he had brought none with him.

I at once agreed and took one of the wax-candles I had brought from home. We explained fully and accurately to the others how they could find us, and then set out upon our way and reached the place which was not far away about sundown. We made a good fire in front of the opening and crept in, Erskwine in front. The opening was very contracted; but the hole widened out considerably so that we could go along

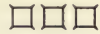
side by side nearly upright. When we had made our way in a piece we heard the bear whimpering softly; and Erskwine who was an old bear-hunter who had knocked round in the mountains for a long time said that he was sound asleep.

Arrived at a curve in the passage, we suddenly caught sight of him at our feet; and in fact he was holding his head be-

tween his feet giving vent to a low wailing sound.

Erskwine who carried the rifle made no long preface but put the muzzle to the back of Bruin's head and fired.

The death struggle and convulsions were short and soon he lay stretched out dead.



Hunting Wild Turkeys

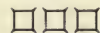
HUNTING turkeys with hounds is certainly one of the most interesting and at the same time agreeable methods of hunting in the world. As soon as the dogs have discovered a turkey walk, they chase after the turkeys with frantic barking. Although the turkey can run very fast the dogs can easily catch him. To avoid this, he flies with his heavy flight to the nearest tree and generally to the top of it and looks from this point of vantage with curiosity down on the dogs yelping below and springing up on the tree.

Now must the hunter begin with his utmost skill to creep up on the bird which keeps looking around and which when he discovers a human being, rapidly seeks safety again in flight. The best way to get the advantage of him is with as much noise as possible to go round the single turkey or the flock in a circle

and break through the bushes with barking and yells. The foolish creature then listens to the strange sounds and when he has come near enough the hunter must spring quickly behind a tree where with a good eye and a steady hand he may bring down with a bullet the bird from trees often one hundred and thirty or one hundred and forty feet high; shot will not carry that far. It is not necessary that the turkey should be fatally wounded; it is sufficient if he is hit in the wing—for his own weight will without fail kill him in the fall.

It is a great satisfaction to see a turkey start in his secure-seeming roosting place, when he feels the bullet turn round and then with a heavy fall strike the earth.

The female weighs nine to twelve and sometimes fourteen pounds; the male sixteen to twenty and often twenty-two pounds.



Wild Turkey Shooting in the Spring

WITH the Spring, returns the pairing season of these birds, and at daybreak their gobbling sounds far out on the clear morning air. Answered from hill to hill, it is a glad sound for the hunter. Shy and wild as the gobbler is, and impossible or at least exceedingly difficult as I have always found it to creep up to him, it is very easy at this season to allure him if one can imitate well the call of the hen. To do this with advantage the American hunters proceed in the manner I shall describe and many a splendid and state-ly turkey-cock have I shot by this method.

Early in the morning before even the first pale shimmer of the dawn shows it-

self in the far east, the hunter proceeds to the place where he knows or suspects the turkeys to be. Having got sufficiently near the spot, he stops and remains quite still until the earliest dawn. Then he imitates the sound of the night owl which in that region cries in a very loud and mournful voice—turkeys cannot abide that sound and those who are to be found in the vicinity begin to gobble with all their might. If the ground permits—that is if there are no dry leaves lying or if the bushes are not too thick-set to allow him to crawl up without noise—the hunter creeps up within gunshot of the tree and brings down the turkey before it is yet day. If he is afraid however that he cannot

get within gunshot without being observed, or if the day has advanced too far before he has reached the neighborhood of the pairing turkeys, then the hunter cowers down noiselessly under an overturned tree trunk, lays his rifle in position ready for shooting and begins to lure. The lure consists of the second thin wingbone of the female turkey which cut off at either end is freed from marrow and held with one end between the lips, the other between the two hollow hands—the air drawn through the bone imitates most deceivingly the voice of the hen turkey.

The gobbler hearing the alluring voice of the hen, gobbles as if he were mad, flies down from the roost upon which he has spent the night and comes along rustling his wings upon the ground, his comb and wattles swollen red and blue, his tail spread out like a peacock, with stately strides marching often to within a few feet of the hunter, provided

that the hunter lies wholly concealed and does not move a limb and indeed does not even bat an eye.

Before shooting at the oncoming turkey with a bullet—for no one carries a shot gun in these parts—it is a good plan to startle him as in the feathers all spread out, the body lies so hidden that often the bullet misses even at a few paces. The best way to startle the bird is by a soft short whistle. At the whistle the turkey quickly pulls himself up and rises with suspicious eye, while he gives voice to a warning, startled, “kitt.” This is the time for the hunter to pull the trigger, for he should have his gun already cocked. If he should lose this moment, the opportunity will never recur, the turkey is lost for good and disappears into the thicket in the next moment.

The shot rings out; the turkey leaps high in the air and falls to earth, dead.



Bee Hunters in American Forests

ST. had a few days before talked about chopping down a tree in which he had discovered a hive of wild bees, but something had always happened to prevent it. On the first of June 1838 we set out on the job talked about for some time, getting away by daybreak. Our company consisted of four persons, St., his brother-in-law McD., Uhl and myself. The two Americans brought axes with them; Uhl and I each a bucket to receive the honey which we hoped to find. We went to a little prairie about three miles away and soon came across the tree which St. had found and marked.

It is the custom in the American woods for a hunter who finds a tree with wild bees, and who has not the time or the inclination just then to cut it down, to carve his name on the tree, or if he cannot write, which was St's case, to cut his mark. If another person chance to find a tree marked in this way, he goes his way and leaves the tree to its first discoverer.

St's tree was an old dead red-oak and stood at the edge of the little prairie. The two axes wielded by strong and skilled arms soon made the tree already infirm, totter and fall with a crash. By St's direction, I had in the meantime

lighted a fire, covered it with rotten wood and placed it on a big piece of bark so that it gave off a thick black smoke. As soon as the tree fell, I held this piece of bark, with its steaming rotten wood straight under the opening through which the bees flew in and out. Stupified by the smoke the bees flew high in the air and not a single one stung me, although there were many flying around and many alighted upon my clothes. Our labour was not without its reward for we found a fairly large limb filled with honey, of which we ate all we could and took the rest home.

On another occasion as the weather about one o'clock in the afternoon became very sultry and unpleasant, we determined to go into the woods and see if we could find a swarm of wild bees which we had looked for in vain six months before.

We took our lure along and went to a place about half a mile away. To find bees in the fall and to set his lure to work, the bee-hunter begins operations by selecting a small open place near where he suspects bees; and if such a place is not to hand he quickly hews one out with his knife and tomahawk; in the middle of this place he sets a stake in the ground, sticks a bundle of leaves on it

and then sprinkles some diluted honey over all.

It is not long before the bees find out the sweet lure, and after they have laden themselves with it, they rise in the air first in small and then in wider circles and then dart suddenly in a straight line for their hive to deposit in the common warehouse what they have collected.

The bee-hunter must watch carefully the direction in which the laden bees proceed—and in that of course a good eye is all-essential. Then he carries his lure two hundred or three hundred paces in the direction observed. The bees flying in the neighborhood soon find this and attack it in its turn. If they keep up the same direction as before, it indicates that the tree is still further away; and the honey besprinkled leaves are carried in that direction until the bees begin to fly in the opposite direction. Now the hunter knows that he has passed the tree and that the hive must be found between the former station and the present. It is then a matter of no great difficulty to discover it. When he is close to the tree and the bees are working, their uncertain rise and flight this way and that, show beyond any doubt the neighborhood of the hive.

We carried our hive forward only once when the bees began to fly in the opposite direction and we now knew that we must find the tree hardly one hundred yards away—accordingly we did

not watch the bees lighting any further but watched those flying around. Darkness coming on, however, prevented us finding the warehouse that evening.

About ten o'clock next day when it began to get a little warm we took ourselves again to our post and after hardly a quarter of an hour's search we found the hole through which the little workers went in and out. It was in an almost entirely rotten oak of no great size, of a species which prefers moist soil, but sometimes grows in the mountains, and bears small sweetish acorns. Its wood is very durable and does not easily rot in the ground.

I rode quickly back to the house brought a pail, an axe, a knife and a spoon—and when I got back to the tree, it fell in quick order under our blows. Smoke was produced, the bees stupified, quickly an opening was hewed in the tree through which we could easily and conveniently extract the honey—and there lay suddenly before us the most beautiful sight a bee-hunter can wish for, a huge mass of well filled honey comb.

We filled the pail with the best, and ate as much as our stomachs could hold—then we set fire to the tree we had plundered so that these bees should not in an future hunt lead us astray—and then we turned homeward.



Hunting Experiences further South

GERSTÆCKER got down into Arkansas in January 1838 and tells his story thus:

“The next night I slept at the house of a Kentuckian who had settled here; more than a dozen hounds ran about the house and he was very anxious for me to take one of them, which according to his account was particularly good for turkey hunting—I believe he wanted to get rid of him.

“I saw as I was sauntering along the road, a deer standing close by the way quietly grazing. As I had no great confidence in the training of my hound, I tied my white linen handkerchief around his neck, knotted the string of my powder horn to it and fastened this to a young oak tree. I got within eighty-five paces of the unsuspecting

and quietly feeding deer but having the wind in my back, the deer soon smelt me approaching and in the twinkling of an eye leaped over a fallen tree into the thick wood. My buckshot whistled after him of course, but in the hurry and excitement I must have miscalculated the distance, for at 150 paces from me he only limped a little in the hind legs. My dog, now however, did not think it necessary to play the simple spectator any longer: He had already bitten the string through and with my handkerchief round his neck to which a piece of the powder horn string still hung, off he set after the fleeing game. “And horse and rider saw I nevermore!” Neither dog nor handkerchief nor deer ever again came within the range of my vision.”

Some time afterwards he fell in with a tribe of Indians whom he joined in a hunt. He says:—

"Sixteen in all of us went together all on foot. Some of the Indians had fire-arms, others only bows and arrows with which they made extraordinarily long and sure shots. I went with a young Indian who had a bow and arrow and we strode along in silence neither being able to make himself understood by the other. About noon we caught sight of a herd of deer. My companion went around the herd to the lee and shot two with his deadly arrows—the leader of the herd, a fat buck which came within ten paces of where I was standing, I shot. To get our game to camp it was necessary to get horses and accordingly we went to the camp a few miles away. Taking horses, at last we came to my deer but there was sitting on him a wild cat making a meal of his flesh. The Indian made a leap towards the cat, and that beast catching sight of the Indian too late, jumped into a tree. An arrow from a sure bow brought her quickly to earth. She was grizzly in color and bigger than our tame cats. These creatures will when angry attack even man."

Travelling south and west he came to a place where some twenty buffaloes had slept the night before.

"The beds were bare of snow, the twigs of the bushes chewed and the tracks looked as fresh as though they had just been made in the white covering of the earth.

"That was all I wanted—buffaloes—and what kind of tracks did I find? An old bull who must be a particularly large and strong rascal. Of course I hoped to overtake the herd in a short time and I followed the trail noiselessly."

He failed, however, to overtake the buffaloes. But he was no worse off than old Slowtrap who told him this story:

"I had once a shot-gun and not far from my house was a little lake which great quantities of wild ducks frequented. One morning I took old "Kicker," (for it did kick like the devil) and went out to shoot a duck or two. I had not been long on the shore when I saw on the other side of a thick bush a whole flock of ducks swimming. A tree trunk which had fallen in the lake seemed to me a splendid bridge to get close to the unconscious ducks. At length when I had reached the last point of the broken

tree and was perhaps sixty paces from the care-free and quacking birds I lifted my old heavy musket and took aim. I knew very well how old Kill-devil kicked, so I leaned as far forward as possible under the firm conviction that the gun would throw me back on the old tree trunk. Three of the ducks were in a line and I thought this just the right moment so I let off the gun at the same time leaning even farther forward if that were possible. = Old Satan missed fire, the push backward expected and counted on, did not come off and down I went head foremost into the lake—but I certainly saw nothing for I had eyes, ears, gob and nose full of water. With great exertion, I got my carcass out again on to the bank, but gun or ducks I never set eyes on after."

This was not the most interesting of Slowtrap's stories—here is another:—

"It was in the Fall in Kentucky at a time when a young hunter could shoot his five or six deer before breakfast that once before daybreak I went out to hunt. I shot two fine bucks and had followed a third about half a mile when he smelt me and made off. Tired with the exertions I had made I threw myself down under a tree to rest a bit so as to be able to go on with the hunt, especially as the night before I had hardly got a wink of sleep because a panther kept howling around, and often came so near the fire that for a moment I could see his outline, but he never kept still long enough for me to send a bullet after him with any certainty of hitting him. Involuntarily my eyes closed; and I cannot say how long I lay there when, half asleep, I heard a rustling in the dry leaves and I felt the leaves thrown over me so fast that in a few minutes I was wholly covered with them. First surprise and then fear of some danger which I did not rightly comprehend held me motionless on the ground awaiting the outcome. Before I could come to a conclusion what to do I heard something move silently away from where I was lying, and carefully raising my head, I could recognize the shape of a panther as it disappeared in the woods.

"My first impulse was to jump up and put fresh powder in the pan of my musket, but as I could no longer see the animal but knew she was certain to come back, I made up my mind to meet cunning by cunning. The creature had looked upon me as a bit of food and had

covered me up all snug for the next meal. I would spoil her little game. I took a piece of a limb which lay near, put it in my place and covered it up carefully with dry leaves. Then I tied my musket on my back and climbed up a little oak tree, patiently to await the conclusion of the adventure. My gun was all ready and with heart beating loudly I waited the return of the panther, who might appear at any minute.

"I sat there perhaps half an hour with eyes fixed upon the place where she had disappeared—when the twigs moved and the female panther, for it turned out to be a female, came back accompanied by two young. I had no doubt at all that it was the old panther which had cached me for her supper.

"She reckoned without her host, however, and I, waiting to see her plan, remained motionless in the tree, my gun all ready pointed.

"She crept up noiselessly till about fifteen paces from where she had left me all nicely covered up, crouched down, with her green eyes fastened on my innocent log, then suddenly threw herself upon it with a mighty spring and struck her sharp fangs deep in the decaying wood.

"I did not leave her long in doubt. Just as she saw she had been fooled and was standing there in the same spot in perplexity, my bullet crashed into her brain and without a sound she fell dead over her supposed prey. I then killed the whelps with no great trouble."

There was an old man Mitchell, too, who once had a dangerous adventure in the Cash swamps. It was the pairing time for turkeys and he had gone out early one morning to shoot a turkey-cock. He heard an old one gobbling for dear life not far away, so he lay down behind a fallen tree and with his turkey call of bone he imitated the hen so as to induce the cock to come nearer. A wild cat must either have been in a neighbouring tree or perhaps led by the call it had slunk up near. The hunter had not been calling long when the brute sprang from behind upon him all unconscious of danger, and tried with all its might to tear his jugulars asunder with its teeth. He was frightened nearly to death and was unable to drag the wildcat off so he had to kill it, when still on his back, with his scalping knife. He had to spend several weeks in bed before he completely recovered from

the deep and dangerous wounds made by its claws.

Gerstæcker one day saw the trail of a bear and determined to follow it. The hounds soon got restless and set off down the slope of the terraced ground, and shortly after the hunters heard them barking below. Just as quick as they could go, they followed the hounds and found them where a hole ran into the mountain under a huge mass of rock.

"The bear was in the hole, for sure, for the bitten off twigs showed that clearly enough, even if the dung lying around in several places had not betrayed him. The hounds made an awful racket and in order to see exactly where the bear was, I laid aside my gun and bullet pouch and with knife in hand was about to look around inside a little when Bruin smelt a rat. He must have been lying close to the opening, the hole was only about eight feet deep and it was a little crook which hid him from view. The barking of the dogs must have shaken him out of his equanimity. As I came near to him, the wind being in my back, he smelt me and growling and roaring he sprang up and out and nearly ran over me. The side spring I made would have done credit to a skirmisher. My old friend who had seen many such a hunt had remained quietly standing by the entrance of the bear's hiding place and watched what I was doing. He held his gun all ready and before I and the hounds could recover ourselves from our confusion, the sharp crack of his weapon rang out.

"The bear, however, seemed to have determined at all hazards not to let himself be taken for he soon disappeared in the clefts of the rocks. But there went with him our two hounds who came to themselves with the sound of the rifle shot. The old man laughed heartily as he saw me standing dazed before the empty hole, knife in hand, and only regretted that he had not been able to devote all his attention to my leap as he was kept too busy by the fleeing bear.

"We followed the dogs and upon the rocks over which we had seen the bear spring, we found on close examination, plain evidence that he was seriously wounded. Weakened by loss of blood he was unable to out-run the dogs. They were both young and inexperienced so that he had not much trouble to keep them off, but they kept him stationary all the same.

"We got to the scene of the conflict

just as the bear had struck down the hounds and was starting to climb up a steep bluff. I aimed at his head and smashed his right front paw. Down he came heels over head and the hounds again engaged him. My old companion was now also at hand and taking steady aim he sent a bullet through the heart of poor Bruin still wearily defending himself. It was a two year old bear fairly fat and promised delicate steak."

The American Panther, Gerstæcker thus describes:—

"It is almost uniformly distributed over the whole of the huge North American continent—it is not substantially larger than a large mastiff, measuring from snout to the tip of the tail, six to seven feet. It has much the same color as the game it pursues. In summer it has a reddish appearance but in winter it takes on a bluer shade. Its smooth skin shows small scarcely noticeable darkish rings, though these indeed are wanting in some specimens. It is dangerous to man only when it is roused or wounded; and the instances when he has sprung upon a camping hunter are very rare (if they have ever happened at all) and only the extremity of hunger could drive him to it. The backwoods men of America have a remarkable saying that the panther likes to attack enceinte women. How far that is true I know not but he is certainly dangerous to young cattle and horses and often does great harm to them."

A story is told him of a buffalo hunt which we omit, simply giving the end of the adventure. After shooting some buffaloes and regaling themselves with half cooked marrow the hunters lay down to sleep.

"Turner wrapped himself in a fresh and heavy buffalo skin, hairy side in, and was soon sound asleep. During the night it became bitterly cold and several times we had to get up and throw fresh wood on the fire to protect ourselves from the truly cutting cold. Turner, however, lay still and never stirred in his warm buffalo skin.

"Toward morning the wind turned round to the northwest and thick snow clouds arose. We made up our minds to break camp as soon as possible, and make for home before the snow-storm caught us, so we prepared breakfast and saddled our horses which had toward morning crept up as close as possible to the fire. We called Turner by name several times to get up—a light move-

ment of the whole buffalo skin was the only answer we got for a good while. At last a smothered voice within the skin called for help. We sprang up in fright for we thought something had happened to him, but we could not restrain our shouts of laughter when we found that the poor devil was frozen in. The flesh side which was out was frozen stiff and hard and did not allow the slightest movement to the captive within. He had actually moulded the wet hide to his body and the frost had turned it into stone except at the head where his warm breath had kept it pliable.

"Shrieking with laughter we rolled him round and round before the fire until the hide was thawed out and we at last could take him out of his shell. The heat and rolling made him quite giddy but a hot marrow-bone soon brought him to himself."

Afterward he went down into Louisiana and took note of the alligators.

"The heat was oppressive even in May, particularly during midday hours and the sun was already beginning to burn. All the whites went indoors to enjoy their siesta and I took my gun and harpoon and went back from the stream a bit into the swamp to shoot alligators which frequented the warm still water in incredible numbers.

"Terrible stories are told of these alligators, that they lie in wait in the neighborhood of man with voracious hunger and lust for blood, and with mad rage fall upon anyone coming near. I have, however, always found them quiet, harmless creatures and liked to hunt them.

"In the huge swamps of Louisiana and indeed throughout the whole southern part of the United States in the water of the lagoons and rivers these alligators live in great numbers. They belong to the lizard family and have the shape and make of the lizard, but they often attain a length of twelve to sixteen feet, especially in the southern parts of Louisiana and Florida. The huge head which extends almost the fourth part of the animal's length, opens like a shark's—the upper jaw instead of the lower being moveable—and a fine set of teeth shows up in front of a rose red throat. Around the body is a hard, armour-like hide beset with small angular pieces; under the belly these become hard, white scales. The hostrils lie close together and when the alligator on a still sunny day rests, as it were, on the

top of the water, only the eyes with a small part of the head and neck and, some sixteen to twenty-two inches in front of these, the nostrils, show above the water. The eyes are themselves very small and look cunning and catlike. The legs are short and not much good for walking but they are so much the better for swimming. A favorite occupation of his is to lie in the hot sunshine upon the sandy bank of a lake or river and with wide open jaws watch the insects flying around which are attracted by a musky odour given out by some glands which the animal has under the throat. They seat themselves upon his broad tongue and when he thinks he has enough he snaps his jaws and swallows them with the greatest satisfaction.

"In the pairing time, the old alligators fight many bloody battles with jaw and tail. The long tail, hard as armour plate, is its most dangerous weapon, but it uses the tail less for killing than for catching its prey—with it, it strikes any victim which it discovers and throws it with the tail, forward to the jaws where it is received with a friendly snap.

"The alligator is like Mary, Queen of Scots, in one respect; it is better than its reputation. The frightful stories which are told about its lust for blood and ungovernable hatred for man are for the most part much exaggerated.

"A white man has very little to fear from the alligator, unless it is aroused and excited or wounded and then very seldom—but the negroes, the alligator certainly does lie in wait for. The piquant, peculiar odour of this race—and it is not the most agreeable scent, particularly on a hot summer day—seems to attract them. They love this smell you know, and who can blame them? Don't many men chew asafoetida (Devil's dirt) to purify their breath? Well they love the nigger—at least an arm or a leg of him now and then; and the black sons of Ethiopia take mighty good care not to wade far into the swamp. The alligator also treasures a tender sentiment for young pigs and puppies. One usually gets for himself the whole of the pigs but only part of the pups, for as soon as a dog caught by an alligator lets a yell out of him, all the other alligators in the neighborhood attracted by the cry, swim in from all sides and take their share of the prey.

"The white man they avoid and when one comes along they leave the shore where they are sunning themselves and dive under.

"They do some damage now and then as we have seen in grabbing young pigs which come near them; they sometimes too, draw under the water a young negro or grab a negress by the leg who has come to the bank to wash—but as they are of but little use to man and have besides an ugly, vicious, dangerous appearance, and what is still worse, an ill name (the old English proverb has it, 'Give a dog a bad name and hang him'), every chance men get they are after them with bullet and harpoon and sometimes large hooks.

"They are not wholly without use to man for put the fat brutes into a kettle and you can get oil from them, useful for machine oil and for the cleaning of cotton. The tail of the small ones—not more than six feet long—has a delicate taste, but the flesh must be detached from the bones as it otherwise will have the peculiar musky flavor of the alligator.

"A planter living not far from us had asked me to have a regular alligator hunt with him as he wanted to get a few gallons of oil and I had the only good harpoon in the neighborhood. One morning he came with his son and two coal-black negro slaves and told me that he had the night before put two light canoes in the little lake behind his house which connected with five or six others by lagoons. He said he was in for a regular hunt; so I shouldered my harpoon, stuck my little scalping knife in my belt, handed the young man my gun and off we went to the lake lying perhaps a mile and a half distant.

"What have you got there, Ben?" I asked one of the niggers, who was carrying under his arm something in a coarse linen bag which gave signs of life.

"You can tell that yourself, massa" said the grinning nigger, opening his tremendous mouth from ear to ear and showing two rows of ivory white teeth—"you can tell yourself" and he squeezed with his left elbow the article in his charge.

"Squeak" went a little pig, which now began to tramp with all four feet.

"Keep still, you little cuss" said the nigger soothingly, "good little fellow, you're all right now."

"He was taking the pig along to coax the alligators near—the pig squealing, the beasts would come nearer and be more easily shot.

"Two printers who set the type for, printed and edited 'The Pointe-Coupée Chronicle' joined us in the hunt and, counting the pig, we made a party of

eight in all. The elder Harbour then divided us into two equal parties. Into each boat went first of all one nigger to paddle, then a printer as overseer—for we did not expect much more assistance from them—then young Harbour with my rifle in one boat and I with the harpoon in the other. I took the pig along and the elder Harbour went in the canoe with his son—the son remarking that the pig and his father were taken along to squeal.

"The sun was burning hot and no shade appeared on the surface of the water except where a solitary cypress overgrown with long grey moss threw its shadow. There was not a breath of air—everything lay in languid stillness and even the alligators which moved along, their heads the color of charred wood, just above the mirror of water, looked as though they were asleep—had not now and then one of the mighty fellows opened his rose-red mouth and after the upper jaw had stood raised for a moment, snapped it down with a heavy snap.

" 'Why even the alligators feel bored here' said Kelly, one of the printers who was with me in the boat.

" 'They'll soon be lively enough, massa,' laughed the nigger, 'just let this little chap under my arm speak.'

"The pig sighed sadly in the sack. We pushed off from the land, keeping all together at first, and tried to creep up on the alligators but they were too shy, and always when we got near and almost within shooting distance, they sank under. I had placed myself in the bow of the canoe and waited in silence for one of the rascals to appear within twelve or fifteen paces, but Harbour senior got impatient and called out to us; 'Give that pig a squeeze, in the devil's name.'

"The printer who was standing up so that he might see better, and to whom it seemed too much trouble to bend down, without moving a muscle of his face, stepped on the pig's belly.

" 'Sque-e-e-e-eak' went the poor beast in agony.

" 'Massa, for God's sake' yelled the frightened nigger, dropping his paddle at the same time, 'you're killing my pig.'

"The experiment had the desired result. Several of the long creatures which up to that time had been swinging away from us turned round and came slowly toward us. The nigger had

to stop paddling and keep quite still, and one of the older brutes about twelve feet long moved close up, not more than thirty paces away. He stopped a moment—he was suspicious of the boat—but the nigger who had knelt down beside his pig, made his pet emit a low whimpering cry, and the alligator attracted by this swam up beside us.

" 'Fire' yelled old Harbour. The rifle cracked and almost at the same moment the fatally wounded monster turned over and showed his white belly. Darting forward and tossing about he fortunately came near enough to my canoe and in an instant the sharp three pronged harpoon was sunk in his flank.

"But the shot had smashed his skull and he could not pitch and dash about much more, so we drew him slowly up to our canoe. It was of course simply impossible to take the huge beast into the small canoe, so we rowed quickly back to the bank and carried him under a tree, still lashing about with his mighty tail.

"The experiment with the pig was now repeated several times and young Harbour shot four more alligators of which we secured only two as I could not get to them quickly enough with the harpoon. I harpooned three besides which ventured too close to us and discovered their danger too late. Two were young and juicy and I forthwith cut off their tails for my own table."

Gerstaecker gives another experience with alligators which might have been very disastrous.

"One midnight I stood harpooning up to the waist in water and although I saw several alligators swimming about, not one came near enough for me to spear him. It occurred to me, I don't know how or why, to coax one near by barking like a dog. I had repeated the experiment hardly three or four times when I saw about sixteen of the brutes coming straight for me. That I thought rather too much of a good thing—deep in the water as I was, I could not be complete master of my movements, so with great and hurried strides I made for the shore some one hundred feet distant. Arrived there I began barking anew, but as I was standing quite in the open they were shy: they would not come close to me but satisfied themselves with swimming around at a respectable distance."

**Address of Hon. Mr. Justice
William Renwick Riddell**

Reprinted from the PROCEEDINGS OF THE AMERICAN
SOCIETY FOR JUDICIAL SETTLEMENT OF
INTERNATIONAL DISPUTES, 1913



ADDRESS OF HON. MR. JUSTICE WILLIAM
RENWICK RIDDELL

On this, my second visit to Washington at a meeting of this Society, I feel myself to be here rather in a dual capacity. One of these capacities I filled the other evening when I unloaded on a long-suffering audience "collections and recollections" concerning the arbitrations between the United States, on the one hand, and Great Britain (including Canada) on the other. That was assisting, in some degree, I hope the objects for which this Society was organized and is being carried on.

The other and more pleasant function which I have to perform, I propose to perform in my weak way this evening. That is, to bring to you the good wishes and greetings of your kindred Commonwealth to the north.

My friends here from lands large or small, as the case may be, will not understand me as intending to depreciate or belittle their countries, of which they are so justly proud, when I devote my attention to a great extent to your country and to mine.

I do not feel myself a foreigner in the United States. After the closing of my court in Osgoode Hall, in Toronto, I can take a train and be, in the morning, in another Canadian city; and, being a lawyer—because although I am a judge I have not ceased to be a lawyer; I am not like the other judge who, when he received Her Majesty's patent appointing him to the bench, at once proceeded to sell his library and buy a new gun—being still a lawyer, like all lawyers on a holiday I go to the court as actors on a holiday go to the theatre. I see

the Union Jack, under which I was born, and under which I have lived the greater part of my life, floating over the court room in the same way it does over Osgoode Hall in Toronto. I see the judge garbed as I am garbed when I am sitting on the bench. I see the King's Counsel and the other lawyers before the court. Apparently everything is precisely the same as it is in my court; but wait a moment. Someone begins to speak. The language is not the language which I learned at my mother's knee, but another language, as ancient, if you like, more euphonious, if you please, but it is not the English language. And the law however scientific and philosophical is not based on the Common Law of England.

But suppose I go the other way. I go west a short distance, and perhaps then south into New York State or into Michigan. I go into a court room over which floats another flag, different from mine indeed, but a flag with which I have been familiar all my life, because I was born and brought up on the shore of Lake Ontario; and our American friends visit us frequently—and they never allow us to forget the Stars and Stripes is their flag. It is a flag with which I have been familiar all my life and which I look upon as next to my own. I enter a court room and I see a judge on the bench, wearing a different garb, it is true, from that I wear. I see no King's Counsel, but I see lawyers there. Sometimes a lawyer has on a black coat, sometimes he has not. But I listen and I hear familiar accents. I hear the common law of England, the same principles of decision, the very same maxims which we use. I hear what the lawyers fondly believe to be Latin, pronounced in the same way

as Latin is pronounced in my country—if I hear Latin pronounced in a certain way, I know I am in the company of common law lawyers, and that I am certainly not in the company of classical scholars—the Latin is pronounced precisely the same way as it is pronounced in my court, in Osgoode Hall; and I feel myself absolutely at home. No Canadian can ever be a foreigner in a land in which the English common law is the basis of decision and the English language is the language of the people.

Your people and ours are practically and essentially one—one in origin, one in language; language spoken perhaps with slightly different intonation, but there is no more difference between the intonation of Washington and Ottawa than there is between the intonation of Ottawa and Vancouver and Victoria; we Canadians have the American pronunciation, largely. We read the same masters, and have the same sentiments—both say:

We must be free or die, who speak the tongue
That Shakespeare spake; the faith and morals hold
Which Milton held.

We are all one people: even when we deplore that difference which divided us a hundred years ago, that division is as nothing compared with the centuries of glorious history, the centuries of glorious literature, which we have in common. That division in the past is merely skin deep, as compared with our essential and fundamental identity and unity.

The solidarity of the English speaking races is growing. It is based not only on identity of origin and identity of language, but on identity of institutions.

You call yourselves a republic, and you at all times have a monarch even if his rule is not for life. We call ourselves a monarchy, while we are really a republic. But after all, in both nations the majority get their own way ultimately, one way or the other.

Our institutions are practically the same. Our views of justice and right, of jurisprudence and honesty, are practically the same; and these, after all, are what make men one, what make men feel themselves the same people.

Of course there are those in the United States and in Canada who are of different lineage and of different language but I am here to speak to Americans, English speaking Americans, as a Canadian, an English speaking Canadian. That sympathy, that solidarity between us has been helped by the hundred years of peace through which we have lived. Let no man persuade you that the War of 1812 has had anything to do with building up the respect and feeling of kindliness and familiarity, the fraternity between the two peoples. I know whereof I speak; I know Canadian people, I venture to think, as well as most and I am thoroughly convinced that no small part of the ill feeling which exists on my side of the line is due to that war directly or indirectly. Thank God it is confined to a comparatively insignificant number. Still, there is ill feeling. You will find people on my side of the line who are just as anxious to take a shot at the American eagle as some men on your side of the line are to twist the lion's tail. They are in general practically negligible there; but you can hear them now and then.

They remind me of the farmer who made a contract

to supply a restaurant keeper with four carloads of frogs. He ultimately brought in two pails full and said those were all he could catch. "But," said the restaurant keeper, "you promised to bring me four carloads." "Well," he said, "I thought there were that many down in the swamp, they made such a racket."

These people—fools they may be called but they are worse than fools. They are traitors to their country. The man or woman who tries to stir up ill feeling and strife between the three branches of the English people is a traitor to his race, I care not whether he lives on this side of the international boundary or the other. That international harmony between us is going to have no small effect upon the peace of the world. God knows something is needed to assist in bringing about the peace of the world. Dr. Hill has spoken not too strongly about the difficulties in the way. There have been those who were working and bearing the burden and heat of the day for years and years and years, looking forward to the advent of peace throughout the world; and to them it seems very little nearer than it was before.

Peace is never popular. There was an election fought in the United States over "54-40 or fight," and the gentleman who had that on his banners succeeded in being elected President of the United States. There never was yet an election fought on a treaty of peace or arbitration treaty. Peace is not popular. Peace has no prancing steeds, no waving banners, no glittering swords, no shining helmets, no stirring tunes. Peace is as gray and drab as her own dove.

War is historic. War is picturesque. War appeals to sentiment. War appeals to taste. War appeals to feeling. War appeals to the lowest, most fundamental elements of human nature.

War I abhor;
And yet, how sweet
The sound along the marching street
Of drum and fife, and I forget
Wet eyes of widows and forget
Broken old mothers and the whole
Dark butchery, without a soul.

Without a soul save this bright drink
Of heady music sweet as hell
And even my peace abiding feet
Go marching down the marching street.
For yonder, yonder goes the fife
And what care I for human life?
The tears fill my astonished eyes,
And my full heart is like to break,
And yet 'tis all embannered lies,—
A dream these little drummers make.

Oh, it is wickedness to clothe
Yon hideous, grinning thing that stalks
Hidden in music, like a queen
That in the garden of glory walks,
Till good men love the thing they loathe.
Art, thou hast many infamies,
But not an infamy like this.

Art, painting, music, poetry, all dignify and glorify war. When did they, except perchance in some droning oratorio, speak of peace?

And yet the leaven is working. A Presbyterian professor of theology not very long ago said to me, "Mr. Justice Riddell, I am thoroughly in accord with you in your views concerning peace; but what good are you doing? How much further on are you than when you started?" I said, "My dear friend, Christ died for sinners many, many years ago. How much further on was the Christian religion fifty years after He died than it was when He died?"

You cannot make omelettes without breaking eggs, to start off with. You cannot do great things in a hurry. Everything great that is done is done slowly, quietly, peacefully. But it is working.

Say not the struggle naught availeth,
The labor and the wounds are vain,
The enemy faints not nor faileth
And as things have been they remain.

If hopes are dupes, fears may be liars.
It may be in yon smoke concealed
Your comrades chase, e'en now, the fliers,
And but for you possess the field.

And though the tired waves vainly breaking
Seem here no painful inch to gain,
Far back, through creeks and inlets making
Comes, silent, flooding in, the main

And not through eastward windows only
When daylight comes, comes in the light;
In front the sun climbs slow, how slowly,
But westward lo, the land is bright.

It is working. The leaven is working. The measure of meal is being moved. People are thinking; and once people think, there is an end of war.

Our people, my people and yours, as I have said, come from the same stock. More than a hundred years ago, when your Revolution became successful, there were hundreds and thousands of splendid Americans who came into my country, Ontario, Upper Canada, and founded Upper Canada. Not as poor suppliants came they into our Canadian wilds, but with head erect, and fearless eye, victorious in defeat, keeping their faith to their king. As the old Cavalier in the revolution a hundred years before kept the faith, so these Cavaliers in the new revolution kept their faith, and came into Canada as British subjects. They brought with them the American conception of liberty, which was the same liberty which their ancestors had brought with them from the motherland. Your conception of liberty and ours is the same. Your and my ancestors determined that they would govern themselves. That is part of the genius of the English speaking people, it is part of their conception of the fitness of things—they insist that they will govern themselves, whether for right or for wrong.

I have always said that when the farmers drew themselves up on Bunker Hill, they fought not for the Thirteen Colonies alone but for Canada and Australia and South Africa and New Zealand, aye, for England herself, for all of England that is worth calling England, and for all that made the British Empire worth while. Your people and mine in Canada have been one; your people are one with the people just across the Atlantic, a few

days sail. Just as your people and mine are one, so the English people and you and we all constitute one. We understand each other.

It is perfectly impossible to make a non-English speaking individual understand an English speaking people. I suppose it is equally impossible for us to understand the French or the Spanish or the German speaking people; but we understand each other. There is a feeling among us that we do understand each other, that we are all one, and we each know what the other will do.

In a town in the south of France there is a beautiful sitting monument under which are written the words "*Sollicita sed non turbata*."

"*Sollicita sed non turbata*"—anxious but not troubled. Each branch of the English speaking people looks at the other, watching with interest what the other will do, but not troubled as to what it will ultimately do.

We have heard something at this meeting about the Panama Canal. I am not going to say one word about the rights or the wrongs of the Panama Canal matter. The American people are guardians of their own honor. They will hear no word from me as to what they ought to do or ought not to do; but this must be noticed that the English people on the one hand and the Canadian people on the other hand, with a few negligible exceptions, have been perfectly calm about the matter, being quite certain that in the long run the American people will do that which is right. We are solicitous as to what they will do, but not troubled about the ultimate result.

So in Mexico. The dealing with Mexico by President Wilson has not been without interest to other nations of

the world. They have been solicitous. Britain has been solicitous. Canada has been solicitous. There are millions of Canadian capital in Mexico today. I know we are said to be a poor people, but we can invest in Mexico. There has been no word of interference with what Mr. Wilson would do. Nobody knew what he would do except himself, and perhaps he did not know—at all events he did not tell anybody. But while nobody knew what he was going to do, Britain and Canada were perfectly confident, perfectly satisfied—solicitous, anxious, as to what you will do, but not “turbatae,” feeling that you will do that which is right. It was the same way the other day when the British men-of-war were ordered to Mexico. The American people were not in the slightest degree troubled. Notwithstanding what some newspapers on this side of the Atlantic and some on the other side have said as to what the intention of Britain was, the American people had no fear whatever that there was going to be any interference on the part of Great Britain with what the American President saw fit to do. The American people were not entirely indifferent—Britain still has a fleet—they were solicitous, if you will, “sed non turbata.”

The peoples understand each other. They know that ultimately each branch of the people will do that which is essentially just. Whether the Panama matter is to be settled in the way referred to by our friend Dr. Hannis Taylor last evening, I do not know. Frankly, I do not care. It is not a matter of any very great importance one way or the other. What is of importance is that the American people shall do that which is right—that they

shall do that which is right in the eye of the world, and particularly in the eye of their brethren across the sea and to the North.

I have always thought that these two nations are bound to stand side by side more than they have done even in the past. Must they not? Who is to do God's work? Who is to take up the white man's burden? No word shall come from me against that magnificent German nation from whom we have derived in Canada no small part of our strength. They are magnificent men in a magnificent nation; but Germany is looking always to the southwestern frontier.

France has been more than once the leader in civilization. France has all she can do to look after herself. She is looking to her northeastern frontier.

We know how Austria is divided. Russia has her own serf problem. Italy is not yet orientated after a war with Turkey. Can small nations help us, anxious as they are, splendid nations as they are, whether in South America, Central America or elsewhere?

The cry of the slave, the cry of the oppressed goes up to the throne of God every day; the tears of the afflicted water His footstool every hour. Who then, my friends, will still the one and wipe away the other, if these two nations do not join hand and hand and do God's work? They are the only nations which can do it. They are the nations which, please God, must do it.

I ask for no treaty. I ask for no formal union. There is that which is stronger than any parchment bond. There is that which is more lasting than words written by pen of gold or steel. It is the moral law; and

the law which proceeds from the throne of God, and more certain than the path of the planets around the sun, is that strong moral law which says that nations derived from the same source, speaking the same language, worshipping the same God under the same form, glorying in their centuries of splendid history in common, shall stand and march and, if need be, fight side by side for justice and truth and righteousness. It is to that union that I apply the words of your household poet:

Sail on, O Union, strong and great!
Humanity, with all its fears,
With all the hopes of future years,
Is hanging breathless on thy fate!

Sail on, nor fear to breast the sea!
Our hearts, our hopes, are all with thee,
Our hearts, our hopes, our prayers, our tears,
Our faith triumphant o'er our fears,
Are all with thee,—are all with thee!

Please God the day may soon come.



R

**Results of the War
of 1812-14.**

**THE HONOURABLE WILLIAM RENWICK
RIDDELL, L.H.D., LL.D., ETC.**

Supreme Court of Ontario

**Results of the War
of 1812 - 14**

RESULTS OF THE WAR OF 1812-14

Mr. Justice Riddell (Toronto), Justice of the Supreme Court of Ontario, was one of the speakers at the meeting in St. Louis of the American Peace Congress in May, 1913.

Certain of his remarks as reported in the press were taken exception to by the *Army and Navy Journal* of New York, and the following discussion took place.

EDITORIAL IN THE *Army and Navy Journal*, MAY
17, 1913.

We are not quite clear as to the meaning that Justice William Renwick Riddell, of the Supreme Court of Ontario, desired to convey in his address before the American Peace Congress in St. Louis on May 3rd when, according to the press reports of his address, he said, in reviewing the hundred years of peace between the United States and Great Britain, that questions more difficult of settlement than any settled by war had been adjusted peacefully between the two countries. It was the settlement of two great questions by war that made the century of peace possible. We should like to know what greater questions have been decided since 1813 than the question of the independence of the American colonies and the prohibition of British search of American vessels. And it might be well to say that the proclamation of the Monroe doctrine and the bellicose, defiant stand the United States

has taken in regard to it have done much to keep the peace in these hundred years. The American people since the day the Doctrine was first promulgated have never shown a disinclination to fight to maintain it, as was made plain at the time of the Venezuela incident in the second Cleveland administration. The chief disputes between this country and England in time of peace since 1813 have been those of boundaries. In the Civil War period there were the Trent affair and the *Alabama* Claims controversy, both of which had their origin in the war. The disavowal by the United States Government of the act of Captain Wilkes in taking the Confederate commissioners from the British steamer was in line with our demands fifty years before which contributed so largely to bring on the War of 1812. The question of damages growing out of the depredations of the Confederate privateers, built in England, had to do with the relations of a neutral in time of war. It was the War of 1812 that smoothed the way to the peace of these hundred years by making it clear to the world that American ships the world over must be as independent as the ships of any other nation. The gaining of our independence in the Revolutionary War would have been of little moment if we had admitted the right of Great Britain to search American ships anywhere on the high seas for alleged British subjects. Such independence would have been the merest mockery. By serving notice on Great Britain, possessor of the largest navy at that time, we informed other nations that they, too, must keep hands off. The last obstacle to the achieving of complete independence was the subjection of our ships to search by a foreign nation. When that was put an end to as a result of the War of 1812, the United States stood upon the same footing as the greatest nation in Europe. It was these two wars, then, which secured to the United States its rightful place among the nations of the earth.

MR. JUSTICE RIDDELL'S REPLY.

(PUBLISHED IN THE ISSUE OF THE *Army and Navy Journal*, JUNE 7, 1913.)

The Supreme Court of Ontario, Appellate Division,
OSGOODE HALL,
Toronto, May 31, 1913.

To the Editor of the *Army and Navy Journal*:

In your issue of May 17th you refer to an address of mine delivered at St. Louis recently, and you say you are not quite clear as to the meaning of a statement made by me. The statement I did make was: "Almost exactly a hundred years after the beginning of that war questions of considerable difficulty which had troubled the two nations for many years came to be decided. This time a board of judges was chosen. * * * During the intervening century all kinds of questions had been settled by all kinds of arbitrations: for slaves taken by the warships of Britain from American citizens; where Americans might fish and what the United States should pay for Americans fishing where they had no right to; where Canadians might catch seals and what they should be paid for not being allowed to catch where they had a right to; what Britain should pay for her defective municipal laws allowing the escape of the *Alabama*, and many more such questions."

If I had used the language imputed to me, and said that "questions more difficult of settlement than any settled by war"—and such language I have more than once used—it would have been fully justified, if we use the word "war" in the sense of an armed conflict between nations.

Not the most ardent advocate of peace nowadays disputes the right of any section of humanity to assert independence, by force if necessary, granted sufficient cause. But a rebellion is not an international war.

And whether the American people when dissatisfied with their rulers should throw off the yoke at once and by violent means, or should obtain substantial independence gradually by constitutional means, as Canada has done, was wholly for the American people themselves. Whether it is better to be entirely separate or to remain united by a common allegiance with the rest of the English-speaking world is, of course, a matter of opinion—perhaps of taste. But it is an abuse of terms to confound a separation of a nation into two with a struggle of one nation with another; and no one would think of using the advantages obtained by a successful revolt as an argument against peace between nations.

Your other example is, I suggest, still less to the point.

I had not thought that at the present day it was considered, by anyone familiar with the history of the War of 1812, that the right of search claimed by Britain had much to do with that war. That it was made a pretext for the continuance of the war after the repeal of the objectionable Orders-in-Council is certainly true. The whole matter has been thoroughly investigated by recent American historians, and I do not intend to discuss it. Let me cite only one well-known American authority, Woolsey's *International Law*, 6th Edit., 1890, para. 221, p. 393: "The War of 1812, it is well known, was justified on this pretext after the Orders-in-council had been rescinded."

Grant that it was an object, or even *the* object of the war party in the United States to settle the question, was it settled by the war?

Before the war at all, and in 1806, at the time of Pinkney's treaty (Dec. 31st, 1806), Britain was willing to give assurance that impressment should be resorted to only on extraordinary occasions and under certain precautions, Winsor, vol. 7, p. 481. This was accepted by Pinkney and Monroe, but the treaty never received the approbation of Congress.

After the war had been going on for some time Bayard and Gallatin, the American commissioners, reported to President Monroe the state of public opinion, and "intimated clearly that if the renunciation by Great Britain of the right of impressment was the condition of peace, then peace could not be secured." Winsor, vol. 7, 484. And Monroe instructed the commissioners to omit any stipulation on the subject of impressment if found indispensably necessary to terminate the war. Mr. Adams, one of the American commissioners at Ghent, had drafted an article on impressment, but the British commissioner refused it absolutely, and it was never again mentioned. "Though not a single one of the objects for which the United States avowedly went to war was secured by the treaty, though the impressment of seamen and neutral rights were not so much as named, the return of the peace was hailed with general joy in America, and the commissioners—somewhat to their own surprise—were warmly commended." Winsor, vol. 7, 487.

Nor did Britain abandon her right to seize her own subjects and to search the ships of any nation for them. "The claim was not alluded to in the Treaty of Ghent, nor has Great Britain since abandoned it." Woolsey, *International Law*, para. 221, p. 393. It is well known that much negotiation took place in Webster's time in 1842 concerning this matter. This great man debated the question with Lord Ashburton, but was unable to procure the slightest concession. See Webster's Works, vol. 6, p. 318.

Nor was it by reason of this war that Britain ceased her practice. After the conclusion of the great Napoleonic wars, it never was necessary for her to fill her ships of war, and she has never since exercised the right of impressment at home.

This question, then, was not settled by war; but while not in form settled, it has been substantially removed from the realm of actuality by the efforts of

diplomacy becoming successful in the various Acts of Naturalization—not war, but diplomacy.

Now what have peaceful means settled? The boundary at Maine, a strip of land half across the continent over four hundred miles wide, Britain's liability to pay for slaves taken from American masters and the amount, her liability to pay damages for allowing the *Alabama* to escape, for allowing the St. Alban's raid, the right of Canadians to catch seals on the high seas, of the Americans to catch fish in Atlantic waters, and many others, any one of which is at least as difficult of settlement as the right of impressment.

If relative importance be the test, is it any more important to determine whether a British captain can search an American ship for British deserters than to determine whether a British sealing ship shall pursue her venture on the high seas at all, or her sailors be taken captive and punished with imprisonment in an American gaol? Or whether an American citizen who had settled upon territory which his country claimed as its own should either become an alien or leave his land, or whether a slave could bid defiance to his American master when he attained the deck of a British ship?

Surely you cannot be serious when you suggest that "the last obstacle to achieving of complete independence was the subjection of our ships to search by a foreign nation." Britain exercised and claimed to exercise no more right against the United States than against any other nation, there was no thought of disputing the complete independence of the United States any more than the complete independence of Spain; nor could the United States have considered the assertion of such a right a challenge to her independence, or she would not have made a treaty of peace without insisting on a repudiation of the doctrine. Neither before nor after the war had anyone the faintest idea of disputing "that American ships the world over would be as independent as the ships of any other nation." For nearly thirty

years the right of search was asserted and, when necessary, exercised, but no one imagined that the United States had not complete independence.

However that may be, I am sure that you join with all peace-lovers in the hope that war will never again break out among the English-speaking peoples, but that the War of 1812-15 will be the last.

WILLIAM RENWICK RIDDELL.

EDITORIAL IN THE *JOURNAL*, JUNE 7, 1913.

JUSTICE RIDDELL'S VIEW OF THE WAR OF 1812.

The letter of Justice William Renwick Riddell, of the Supreme Court of Ontario, which appears in another column of this issue, respecting the editorial criticism in our issue of May 17th, page 1139, of his remarks at the recent American Peace Congress in St. Louis, seems to have been written largely from the British point of view. Justice Riddell is surprised that anyone at this can ships claimed by Great Britain "had much to do with the War of 1812." May we take the liberty of calling the attention of the distinguished jurist across our northern border to one of the most recent of histories, that of the United States Navy published in 1911 by J. B. Lippincott and Company, Philadelphia? This book is the joint work of Capt. George R. Clark, U.S.N., William O. Stevens, Ph.D., Carroll S. Alden, Ph.D., and Herman F. Krafft, LL.B., all of the faculty of the U. S. Naval Academy.

The sixth chapter of this volume is entitled "The War of 1812, Causes and Early Events." The first words of this chapter are the following: "The causes of the War of 1812 were mainly the impressment of American sailors and the restrictions on our trade caused by the British order-in-council and Napoleon's decrees of Berlin, Milan and Rambillet. The outrages con-

nected with impressment, such as the forcible seizure of our citizens from merchantmen, and especially from the deck of the frigate *Chesapeake* in 1807, rankled most in the hearts of our countrymen." If Justice Riddell will read the histories of the War of 1812 more closely perhaps he will learn that the first gun of that war was fired, not in 1812, but back in 1807, just as the first gun fired in the Revolutionary War is traced by students back to the Boston massacre in 1770. From this Lippincott history we again quote (page 95), this time to illustrate the effect of impressment upon the American mind: "The wrongs committed by the press gangs were brought to a climax by the *Chesapeake-Leopard* affair in 1807. Some alleged deserters from British ships had enlisted on the U.S.S. *Chesapeake*. Britain demanded they be given up. The Washington Government refused, holding they were Americans. The British ships were then ordered to watch for the *Chesapeake* and search her. On June 22nd, 1807, as the *Chesapeake* set sail from Hampton Roads to relieve the U.S.S. *Constitution* on the Mediterranean station, she was spoken by H.M.S. *Leopard*. Capt. James Barron, of the American ship, supposing the message to be of a peaceful character, hove to and received an officer from the *Leopard*, who demanded the men charged with being British deserters. Barron refused to give them up, whereupon the British frigate opened fire, and the American vessel, not being prepared for action, soon hauled down its flag. Only one of the Halifax deserters was found on board, the others having deserted before the *Chesapeake* sailed, but the British took off three other men, all Americans."

Of this seizure the history goes on to say: "The *Chesapeake* affair angered the nation far more than had any outrages on our merchantmen; it was an insult to the Navy, to the very sovereignty of this country. Yet the wavering policy of Jefferson and of Madison preferred a war of words to redress by the sword. It was

not until 1811 that Britain made a formal disavowal of this act by restoring to the United States three of the four men who had been seized—one had been hanged at the yard-arm as a deserter." Immediately after the *Chesapeake* incident Jefferson ordered by proclamation all British ships of war to leave American ports. Then Great Britain retorted by declaring that all ports thus excluding British ships would be treated as blockaded. In retaliation Napoleon announced by his Milan decree that any foreign vessel allowing the British to board her and examine her papers became *ipso facto* liable to seizure. "Some British statesmen," says the history, "tried hard to avert the war. * * * The Prince Regent in answer to popular clamor now did his utmost to avert hostilities, and the British orders against American commerce were accordingly revoked early in 1812. But American patience had been exhausted and the good intentions of the Prince Regent were too late."

Has Justice Riddell forgotten also the fight between the U.S.S. *President* and H.M.S. *Little Belt* on May 16th, 1811, brought on by the British impressment? The history describes the declaration of war by the United States, and after enumerating the causes of the conflict says: "And last and most important of all, impressment." In a message to Congress on June 1st, 1812, President Madison recommended a declaration of war against England. In this message was set forth a list of the grievances of the United States against Great Britain. "The chief grounds for this recommendation of war by the President," says the International Encyclopedia, page 118, vol. 17, "were the impressment of American seamen, the extension of the right to search to include United States war vessels, the 'paper blockades' established by the British orders-in-council, and the alleged efforts of Great Britain to persuade the North-Western Indians to attack the Americans." Does Justice Riddell believe that President Madison thought that the right of search claimed by Britain did not have "much to do with the war"?

Of the results of the war the Lippincott history says: "Though Great Britain maintained her prescriptive right to impressment she did not later continue her practice in this regard." Justice Riddell is too well informed on history for us to presume to call his attention to the fact that treaties are compromises, except where one of the parties to the war is entirely prostrate, as in the Franco-Prussian war of 1870. Concessions were made by Great Britain in the Ghent Treaty which probably justified the American commissioners in not insisting upon the impressment feature of the American protest, especially as the collapse of the Napoleonic *regime* had left England free to send large forces against the United States. The fact that impressment was not mentioned in the treaty, of which Justice Riddell makes so much, is of little moment, since the feelings of the American people were never again outraged by searchings of their warships as they had been before the war. There never again was an incident like that of the *Chesapeake* and *Leopard*. Justice Riddell says this change was due to the alteration in the method of recruiting which the British navy experienced with the downfall of Napoleon. This may well be true, but who shall say how large a part the War of 1812 had in bringing England to see the unwisdom of impressment and of the obnoxious system of press gangs?

It seems to us that a study of American history will prove three things to be true: (1) That impressment was a controlling influence in bringing on the War of 1812; (2) that the searching of American ships at sea was an insult to the sovereignty of the United States, and (3) that after the war the British gave up their practice of searching American ships and eventually the custom fell into complete disuse. We are told that the war did not settle impressment because Great Britain still maintained her right to employ it. The United States did not care a fig about the "maintaining" of the right; what it did object to, however, was the enforcing of that "right," and the war put an end to that.

REPLY OF MR. JUSTICE RIDDELL, PRINTED
IN PART IN THE *JOURNAL OF*
JULY 19, 1913.

(Room Could Not Be Found for the Whole.)

Supreme Court of Ontario, Appellate Division.

OSGOODE HALL,

Toronto, June 17th, 1913.

The Editor of *The Army and Navy Journal*, New York:

DEAR SIR,—Your interesting editorial of the 7th of June induces me to trouble you with another letter.

The object of my former letter was to explain what was meant by the statement “that questions more difficult than any settled by war had been adjusted peacefully between the two countries.” In justifying that statement, I challenged your assertion that the war had brought about “the prohibition of British search of American vessels.”

I had not thought that my opinion as to the causes of the War of 1812 was of the slightest interest or moment; and had not intended to express any opinion. Whatever that opinion is, it is derived almost wholly from the study of American authors and the original documents referred to by them. The English writers, with practical unanimity, seem to regard that war rather as an unpleasant and unfortunate episode in the midst of a life and death struggle for national existence and freedom; while an Upper Canadian is, by reason of his country having been a seat of war, prone rather to magnify than to minimize.

Whether those Americans, by no means few in number or insignificant in position, whom writers like Lossing assail, and those like Mahan reason with, and who contended that the ostensible causes of the war were not the real ones, were right, I do not discuss. It seemed to me that that school was somewhat in the ascendant

in the United States to-day amongst historians; but I may easily be mistaken.

Your remarks upon my supposed opinion make it not improper or egotistical to say that the inclination of that opinion is to take the allegations of the United States at their face value. The only doubt as to the accuracy of that opinion (which I once held most firmly), was produced by American writers and the original documents referred to by them. I shall, as soon as possible, examine the Naval History you kindly refer me to, and I unfeignedly wish the authorities produced in that work may banish any doubts I may entertain. Of course no judgment that is worth anything can be either formed or changed by the mere opinions of writers, however eminent; original documents by those who lived before or during the war must form the means of judgment.

For all purposes of this discussion, I fully accept your proposition that the impressment of American seamen was an efficient cause of the war. This enormously increases the force of my contention as to its futility. A mere pretext can be abandoned without much comment, but what of a real and substantial cause?

Neither did I assume to justify the British claim to impress Americanized sailors, much less some of the instances of the exercise of the supposed right. What I did and do combat is contained in your statement,—“The last obstacle to the achieving of complete independence was the subjugation of our ships to search by a foreign nation. When that was put an end to as a result of the War of 1812, the United States stood upon the same footing as the greatest nation in Europe.” I suggested that the former statement could not be seriously meant; but, of course, the accuracy of the statement must depend upon the meaning to be attached to the word “independence,” and every nation has a right to define the word as it pleases. It does not seem to me that the independence of the United States was any

more menaced by the exercise of the right of search by Britain than the independence of Britain was menaced by the United States searching and seizing British vessels sealing on the High Seas. But I most cheerfully admit that that may be a matter of opinion; and I do not here controvert your contention.

The statement that "that was put an end to as a result of the War of 1812" is the only one I intend to contest; and in doing so I ask you to believe that I am sincerely desirous of determining the exact fact. I have no wish for controversy for controversy's sake, and certainly none to take away from the United States any honour to which it is entitled. Nor am I a peace-at-any-price man. War, in my view, is unhappily sometimes not only a right but a duty; and I shall be more than glad to find that this war did really settle some international question of dispute, and that the valuable lives lost and immense treasure expended were not wholly thrown away.

It may be of advantage to see the exact situation of affairs at the beginning of the war. In the further discussion of this matter, as in the former letter, I make use of the works of American authors of undoubted standing and patriotism, chiefly Mahan's "Sea Power in its Relation to the War of 1812, Boston, 1905."

In considering the practice of impressment of seamen one should get rid of the idea that it arose from sheer arrogance. The claim depended on several principles. The first, that no English-born subject could, without leave of the Crown, absolve himself from his allegiance. This is part of the Common Law of England, the common heritage of Englishmen and Americans, and the right is preserved by Magna Charta (cap. 42), the Great Charter of the liberties of the race. The Supreme Court of the United States from the first, and as late as 1830, declared this to be undoubted law; and the American text-writers all agree in that view. This principle has been abandoned by Britain by express

Statute, but only in 1870. It is not very unlike that principle, thoroughly disputed, but still more thoroughly maintained, that a State cannot leave the Union. Some millions of American citizens about fifty years ago thought they could absolve their allegiance to the United States and set up a new nation of their own, but the North advanced very efficient arguments to the contrary.

The next principle is that in case of need the Crown is entitled to the services of all its subjects. This is also Common Law, and the same law prevails in all civilized countries. In some, every male citizen or subject must serve a number of years in the army or navy, even in time of peace. The principle is that underlying the Conscription Act of the Confederate States, the Act under which the Draft took place for soldiers, which resulted in the well-known Draft Riots in your city, etc., etc.

About these two principles, there was no dispute.

Then Britain claimed the right to seize her subjects wherever she found them, except within foreign territory; and as the open sea was not foreign territory, she claimed the right to seize them on the open sea. There never was a claim made to seize American seamen, but Britain did claim and exercise the right to seize her own native-born subjects, although they had attempted to get rid of their allegiance. (Mahan, vol. 1, p. 3.) The United States did not contend that Britain had not the right of seizing her own natural-born subjects in British waters. It suggested that this right should not be exercised, but it was recognised that "this concession, if granted, would have been a friendly limitation by Great Britain of her own municipal jurisdiction." The naturalized Russian Jew finds himself still in parlous condition if he ventures back to Russia.

But the United States contended that "whatever the native allegiance of individuals, on board any vessel on the open ocean their rights were regulated by the nation to which the ship belonged." (Mahan, vol. 1,

p. 5.) Britain's claim was made as to merchant vessels without reserve, so long as they were not within the waters of another nation. There was no claim advanced officially to enter upon any ship of war of another nation. The act of the *Leopard* in enforcing a search of the *Chesapeake* was disavowed, and Berkeley recalled; and the principles of the British Government should no more be rendered responsible for that unfortunate occurrence than the principles of the United States for Commander Wilkes boarding the *Trent*. Berkeley had made a mistake in the law just as Wilkes did, his act was repudiated just as Wilkes' was, and while he was recalled he was not disgraced any more than Wilkes was. The only dispute on principle between the two countries, was whether the right to claim the services of a natural-born subject by taking him from the merchant ship of another nation could be exercised by Britain upon the open sea, which belongs to no one, or only within Britain's own waters.

In Britain there was no difference of opinion on this point; in the United States there was. Able and patriotic Americans like Gouverneur Morris had no hesitation in assenting to the British doctrine. Even in 1813, when the war was raging, he writes,—“Men of sound mind will see, and men of sound principle will acknowledge its existence.” (Mahan, vol. 1, p. 6.) But Britain had, in pursuance of what she conceived to be her right, no more thought that she was doing wrong or imperilling the independence of the United States than the United States thought, three-quarters of a century later, when it seized British sealing ships sixty miles from the nearest land, took them to an American port and put the crews into an American prison, that it was doing wrong and imperilling the independence of Britain.

Whether such an act is an insult depends on the definition of “insult.” Nothing is ethically an insult that is not intended as such. In every day life each

person judges for himself as to what is an insult, and anything he considers an insult is, to him, an insult. The American nation had, in my view, a perfect right to consider the exercise of this right an insult if they chose, to submit to it for a time if they chose, and to say when they chose that they would submit no longer. And no discredit is to be attached to that nation for not having declared war before. As a very great American says,—“No nation is obliged even in honour to adopt the *ultima ratio regum* in every case in which it is justified.”

That the exercise of this supposed right was, beyond question, accompanied by very great hardship and very great abuses is quite certain. Webster in his splendid argument addressed to Ashburton, says,—“The difficulty of distinguishing between English subjects and American citizens has always been found to be great, even when an honest purpose of discrimination has existed.” Hundreds of instances were found where Americans were claimed as English and impressed; some by an honest mistake. It is, perhaps, too much to think that this was the cause in every instance—a commander of a man-of-war with only half a crew, having in his hands the means of filling up his complement, is subjected to a severe test of virtue, too severe probably to be always withstood. It was an evil practice liable to terrible abuses.

But one should not forget that it was not in pure wantonness that the right was exercised; it was only in the midst of a life-and-death struggle for national existence that it was resorted to. Britain stood almost single-handed against great odds, her very life depended on her navy, she could not supply that navy without impressment, and there were not enough seamen left at home to impress. The dire distress, the imminent danger, of Britain was not unknown to Americans then and is not unknown now. “In 1796 her fleet was forced to abandon the Mediterranean. In 1799, a year after the Nile, Nelson had to implore a small Portuguese

division not to relinquish the blockade of Malta, which he could not otherwise sustain." (Mahan, vol. 1, p. 74.)

But she offered, before the war and when war was not even threatened, to undertake not to exercise the right except on extraordinary occasions and with proper precautions. That is how matters stood at the beginning of the war.

There is no doubt of the insistency of the American Government on the abandonment of the right by Britain.

In volume 1, of Mahan, we find it related that while Jay had no instructions in the matter when sent to negotiate the Treaty of 1794 (p. 88), Rufus King took it up in 1796 and 1797 (p. 120); Monroe had specific instructions from Madison in 1803 to protest, and again he and Pinkney in 1806; from that time on till the war, there were repeated and vigorous representations made.

When the war broke out, Admiral Warren came out from England to treat for peace. Monroe, the Secretary of State, told him that "an indispensable condition was the abandonment of the practice of impressment from American vessels," (p. 391), that "impressing from under the American flag must be discontinued during armistice arranged." The British Government refused this term, and no armistice was arranged. (pp. 391-392.)

In volume II. we find the story continued: Jonathan Russell, the American Chargé d'Affaires, in August, 1912, suggested an armistice to Castlereagh, but as the proposal included the same requirement, Castlereagh refused to consider it and absolutely refused even to discuss with him the suspension by Britain of the exercise of the right. This remained the only one of the two causes of rupture, the obnoxious Orders-in-council having been already repealed. (p. 410.)

The Czar of Russia, having offered to assist in bringing about peace, was informed by the British authorities that they would not submit the matter to the discussion of any mediator. (p. 412.)

The United States had accepted the Czar's offer and named Bayard and Gallatin to act with Adams as commissioners; Adams was informed by the Czar's ministers of the absolute refusal of Britain to discuss the terms of peace on any such basis. Subsequently Castle-reagh suggested direct negotiation, and this being accepted by the United Staes, Henry Clay and Jonathan Russell were added to the Commission. (p. 413.) The demand of the three Commissioners had been peremptory: "Impressment must cease by stipulation. If this encroachment of Great Britain is not provided against, the United States have appealed to arms in vain." (p. 413.) And when direct negotiations were to begin "the same confident tone is maintained * * * this degrading practice must cease, * * *" and again later on, "in concluding a peace, even in case of a previous general peace in Europe, it is important to obtain such a stipulation."

Bayard and Gallatin were under no delusion as to the stand of Britain and the state of public opinion there. They, on the fall of Napoleon, intimated clearly to the President, Madison, that if the renunciation by Britain of the right of impressment was the condition of peace, then peace could not be procured. (Winsor, vol. VII., p. 484.) At a Cabinet meeting held June 27th, 1814,—“In consequence of letters from Bayard and Gallatin and other accounts from Europe of the ascendancy and views of Great Britain and the dispositions of the great Continental Powers, the question was put to the Cabinet,—‘Shall a treaty of peace, silent on the subject of impressment, be authorized?’ Agreed to by Monroe, Campbell, Armstrong and Jones. Rush absent.” (Works of Madison, vol. III., p. 408; Mahan, vol. II., p. 266, note 3.) There was at that time no thought of Britain giving way on any point.

The same day the Commissioners were directed to “omit any stipulation on the subject of impressment if found indispensably necessary to terminate it. You

will, of course, not recur to this expedient until all your efforts to adjust the controversy in a more satisfactory manner have failed." (American State Papers, vol. III., p. 704; Mahan, vol. II., p. 266.) Gallatin had in the same month written the Secretary of State, "no better terms will be obtained than the *status ante bellum*." (Mahan, vol. II., p. 415.) The British Commissioners were instructed that "the question of abandoning the practice of impressment would not be so much as entertained." "The Commissioners were not even to discuss it." (Vol. II., p. 416.) When Mr. Adams drafted an article on impressment, the British Commissioners absolutely refused to consider it at all, and it was never mentioned again. (Winsor, vol. 7, p. 487.)

No one suggests that the abandonment of the demand that "impressment must cease by stipulation" was an acknowledgment by the United States of the justice of Britain's claim; but that this demand was abandoned is beyond all controversy.

From the ardent Lossing to the (in this instance, at least) judicial Roosevelt, American authors of standing state that the subjection of American ships to search, etc., was not put an end to by this war. Lossing, p. 1065,— "It (i.e., the Treaty) did not * * * secure to the Americans that immunity from search and impressment for which they went to war." Roosevelt, Naval War, 1812, p. 7, calls it,— "a peace which left matters in almost precisely the state in which the war found them."

You do not, of course, assert that the matter was mentioned in the Treaty, but you say,— "Concessions were made by Great Britain which probably justified the American Commissioners in not insisting upon the impressment feature of the American protest." (I may say, *en passant*, that this would be wholly inexplicable if the right of search was an "obstacle to complete independence.")

You add,—“especially as the collapse of the Napoleonic regime had left England free to send large forces against the United States.” I am not sure as to the precise meaning of this; but apparently you mean that the fact that England could now send a large force into the war was a reason for the United States “not insisting upon the impressment feature of the American protest.” That is practically certain; but when you suggest that concessions were made by Britain which justified the American Commissioners to abandon the claim, I take issue and most respectfully ask for particulars.

What ground is there for this proposition of concession inducing an abandonment of the claim by the American representatives? Their instructions are of record; the proceedings of the Commissioners did not take place in a corner; what they did and why, is well-known, and if it were the case it could easily be proved. Has anyone attempted to do so?

The fact is that the United States came out with nothing better than the *status quo ante bellum* (Mahan, vol. II., p. 431), even if it was not in a worse position as regards the right to fish, which is a large question and one I do not propose to touch upon here. Of course Britain abated some of her claims to territory which had not been hers before the war, etc., but these had no kind of relation to the claim as to impressment set up by the United States which Britain had, consistently and persistently, absolutely refused even so much as to consider.

Then look at the Treaty itself; it is short and easily accessible. Art. I. provides for the restoration of the *status quo*; Art. II., for the restoration of prizes taken after the ratification of the Treaty; Art. III., prisoners of war; Arts. IV. and V., for arbitration of the River St. Croix; Arts. VI. and VII., for arbitration of the boundary at the Lake District; Art. VIII., refers to these arbitrations; Art. IX., warfare against the Indians by the United States to cease (a concession by the United

States); Art. X., an indefinite agreement to attempt to abolish the slave trade; and Art. XI., as to ratification. That is all. Where is the Concession?

At the conclusion of the war, then, the state of affairs was that Britain expressly refused what had been repeatedly asked, and the United States was in the same state as before.

But you say "the United States did not care a fig about the maintaining of the right; what it did object to, however, was the enforcing of that 'right,' and the war put an end to that." With both of these statements I take issue.

In the first place the United States did care much more than a fig about the "maintaining of the right." We have seen that the United States demanded a "stipulation" that impressment should cease, and failed to obtain it. Then after the war, Adams, Clay and Gallatin were appointed Commissioners to negotiate a commercial treaty with Britain; they advanced at the very first opportunity a claim for the abandonment of the right of impressment by treaty. Britain refused to take any action in the matter (Winsor, vol. 7, p. 488), although later on Castlereagh expressed a willingness to consider the matter. (Probably the death of this statesman prevented a treaty being arrived at expressly abandoning the right.)

We may pass at once to Webster's time. I presume it cannot be contended that that very great man wasted his time in the discussion of a matter about which his country did not care. In his letter to Lord Ashburton, August 8th, 1842 (Webster's Works, vol. VI., p. 318), he says,—“We have had several conversations on the subject of impressment, but I do not understand that your Lordship has instructions from your Government to negotiate upon it, nor does the Government of the United States see any utility in opening such negotiations unless the British Government is prepared to renounce this practice in all future wars. No cause has

produced to so great an extent and for so long a period disturbing and irritating influences on the political relations of the United States and England as the impressment of seamen by British cruisers from American merchant vessels. * * *

* * * * At different periods both before and since the war negotiations have taken place between the two Governments with the hope of finding some means of quieting these complaints. * * * A common destiny has attended these efforts; they have all failed. *The question stands at this moment where it stood forty years ago.* * * * England asserts the right of impressing British subjects in time of war out of neutral merchant vessels, and of deciding by her visiting officers who among the crews of such merchant vessels are British subjects." He then proceeds to argue the question with great fairness and distinguished ability, and proceeds,—“A question of such serious importance ought now to be put at rest” and asks: “Is it not high time that * * * England should at length formally disclaim all right to the services of such persons and renounce all claim over their conduct.” Speaking of the calm and quiet which have succeeded the late war, Webster continues: “Under these circumstances, the Government of the United States has used the occasion of your Lordship’s pacific mission to review this whole subject and to bring it to your notice and that of your Government.” Lord Ashburton answered: “No differences have or could have arisen of late years with respect to impressment, because the practice has, since the peace, wholly ceased, and cannot, consistently with existing laws and regulations for manning Her Majesty’s Navy, be, under the present circumstances, renewed.” He adds: “Sensible of the anxiety of the American people on this grave subject of past irritation, I should be sorry in any way to discourage the attempt at some settlement of it,” and in view of Webster’s “very ingenious arguments,” he admits they “prove a strong

necessity of some settlement." He adds: "It must be admitted that some remedy should, if possible, be applied; at all events it must be fairly and honestly attempted," and while "during the continuance of peace no practical grievance can arise * * * it is for that reason the proper season for the calm and deliberate consideration of an important subject."

In his wonderful speech in the Senate, April 6th and 7th, 1846, Webster said: "It has been said that the Treaty of Washington and the negotiations accompanying it, leave the great and interesting subject of impressment where they found it. I must be permitted to say that the correspondence connected with the negotiation of that Treaty, although impressment was not mentioned in the Treaty itself, has * * * been regarded as not having left the question of impressment where it found it, but as having placed the true doctrine in opposition to it on a higher and stronger foundation. We shall negotiate no more, nor attempt to negotiate more, about impressment." (Webster's Works, vol. V., pp. 145-6.) We find him as late as May 21st, 1851, at a public dinner at Buffalo, speaking with pride of his discussion with Ashburton on the question of impressment. (Webster's Works, vol. V., p. 540.)

Was all this elaborate fooling? Or was it a matter about which the United States did really care?

The Presidents were not wholly silent in their messages to Congress: Madison, in his Seventh Annual Message, December 5th, 1815, speaks of the Treaty, of the Commercial Convention following it, and of arrangements on subjects which might endanger future harmony. He continues: "Congress will decide on the expediency of promoting such a sequel by giving effect to the measure of confining the American navigation to American seamen; a measure which * * * might have that conciliatory tendency * * *" Tyler in his message, August 11th, 1842: "The impressment of seamen from merchant vessels of this country by

British cruisers, although not practised in time of peace, and therefore not at present a productive cause of difference and irritation, has, nevertheless, been so prominent a topic of controversy, and is so likely to bring on renewed contentions on the first breaking out of a European war, that it has been thought the part of wisdom now to take it into serious consideration. The letter from the Secretary of State to the British Minister explains the ground which the Government assumed and the principles which it means to uphold." This is the letter already referred to from Webster to Ashburton.

Is it not quite certain that all these years the United States was not a little anxious for an express abandonment of the right claimed by Britain?

The statement that the war put an end to its enforcement has been dealt with by implication. The old and ever-recurring logical fallacy *post hoc, ergo propter hoc* out of the way, what is there to support it?

You seem to say that the alteration in the method of recruiting with the downfall of Napoleon was the cause of the abandonment of the practice of impressment; but you add: "Who shall say how large a part the War of 1812 had in bringing England to see the unwisdom of impressment and of the obnoxious system of press-gangs?" This appears to be a claim that the war, while it did not directly bring about a cessation of the practice of impressment of American seamen, did so indirectly by causing a cessation of the practice of impressment altogether. If this were true, I should be inclined to think the war was worth while.

The claim or suggestion is to me quite novel; I can find nothing to support it.

In the first place impressment did not cease either at the beginning or the end of the War of 1812; peace being agreed to in December, 1814, warrants to impress continued to be issued in 1815, and ceased not with the Treaty of Ghent, but with the downfall of Napoleon; and then ceased because they were no longer needed and

as they would have ceased had there never been an American war. Thousands of seamen were discharged and cast adrift who would fain have continued to serve. In 1810 to 1812 there were 113,600 seamen in the navy; in 1815, 70,000 for part of the year, 55,000 for the rest; in 1816, 24,000; in 1817, 13,000, while the decrease in number and tonnage of ships was equally marked. England was never brought "to see the unwisdom of impressment" in the sense of abandoning the right to impress.

The condition of sailors in the Royal Navy was improved in the general trend of advancing humanity, but the first modification in the law of impressment was not till 1835, twenty years after the war; and when the Act 5 and 6 William IV., cap. 24, was introduced, Sir James Graham, the First Lord of the Admiralty, expressly and emphatically reasserted the right of the Crown to impress seamen. All that the Act did was to limit the term of impressed men to five years, unless they volunteered for a further time, and to protect them against being impressed again under two years after discharge. All this will be found in Hansard. The improved condition of seamen has induced such an increase in volunteers that there is not now, and has not been for nearly a century any necessity for impressment, and there has been no war calling for a very large number of seamen; but the right still exists, and I can see no reason to imagine that the War of 1812 had anything whatever to do with the abandonment of the practice.

There is no doubt that England, long before the war, knew the unutterable villainies attending the practice of impressment. The wrongs of impressed men had been represented in petitions to Parliament at least as early as 1760; there was a mass of literature dealing with the subject: every one knew that the impressed man differed from the slave only in that his lot was not hereditary and he might some day be free. Many were the murders of mem-

bers of the pressgang and of their intended victims; wounds, slavery and death were all common incidents. The only counter-argument was "Necessity." Every fleet in the world but one was filled in like method, and it is to the eternal credit of the United States, that it, from the beginning, has made the naval service so attractive that volunteers have been found in sufficient numbers. Whether, had this not been the case, it would not have resorted in times of national peril to means for filling the navy, similar to those employed for filling the army, we need not consider; but in any case I venture to assert that the United States by the War of 1812 did nothing to abolish the practice in other countries.

This letter has grown to an inordinate length, but the subject is a very attractive one, and some of your propositions are new to me.

I should have liked you to join me in the hope that the War of 1812-14 will continue to be the last among the English-speaking peoples. I am

Yours very sincerely,

WILLIAM RENWICK RIDDELL.

P.S.—I am not sure what is the exact application of your allusion to the "*Little Belt*" episode, when more than a year before the war, as Roosevelt says,—“the American Frigate *President* attacked the sloop *Little Belt*.” Of course, journals at the time said that Rodgers was sailing to release impressed men by force, but Monroe assured the British Minister, Foster, that Rodgers had no orders to that effect. Upon the enquiry, Rodgers and his officers swore that their ship had been fired on first; this was their sole justification. The story of the British officers was different; they alleged an unprovoked attack by a warship of far superior force. The United States did not pretend to justify an attack of that character, and it was because of the positive assertions under oath of the American officers that the matter

was allowed to drop. The probabilities seem to be in favour of Mahan's conclusion that the affair was an accident (Vol. I., p. 258)—though, no doubt, there are those who think the worst of the parties concerned. If Captain Bingham, with a sloop of twenty guns, was foolish enough to attack a frigate of forty-four, he deserved all he got.

W. R. R.

[NOTE.—Neither in the address at St. Louis nor in the discussion with the *Army and Navy Journal* was the cause of the War of 1812-14 a matter of debate; all that was under consideration by me was the result of the war.

Those who are interested in the question of the real causes may find a very recent and (apparently) a most fair and judicial discussion in an address by the Honourable John W. Foster at the meeting of the American Society for the Judicial Settlement of International Disputes at Washington, December 15th, 1910. Mr. Foster claimed the right to discuss the historical events of his country freely; he said that his great-grandfather went through the Revolutionary War as a Virginia Rifleman, his grandfather fought with Harrison at Tippecanoe and in his Canadian campaign, members of his family went to Kansas with their rifles in the fifties to save that territory to freedom, while he himself gave nearly four of the best years of his life as a volunteer in the Civil War to maintain the Union.

I copy a few sentences from his paper, which I may say gives full references to the sources: "The War of 1812 was a partisan and sectional war. . . . determined upon as a party measure. . . . slight disguise was made of the purpose to conquer Canada. . . . The impressment of seamen did not bring on the hostilities with Great Britain, but its abolition became the avowed object of the war after the British Government had yielded on the question of blockade. . . . so far as naturalization and protection papers were concerned, it was manifest that unblushing frauds were openly committed and that with the connivance of American local officials. . . . The question was not settled by the War of 1812, and the American Government continued to press for its adjustment. . . . but it was not until 1860 that the President was able to inform Congress that Great Britain had finally abandoned its claim of visitation and search. Woodrow Wilson finds that nearly every year from 1804 up to the embargo, owing to the flourishing American trade, 'four thousand two hundred additional men were needed yearly to put crews into the new crafts, and it

was estimated that twenty-five hundred of the new men were in fact British subjects, no small proportion of them unquestionably deserters from His Majesty's Navy.' [Henry] Adams records that 'the captain of any British frigate which might happen to run into the harbour of New York, if he went ashore, was likely to meet on his return to the wharf some of his boat's crew strolling about the town every man supplied with papers of American citizenship no pretense was made of concealing the fraud, but these (papers) were issued in any quantity and were transferred for a few dollars from hand to hand.' Mahan cites the case of a retired American seaman of a North Carolina port who stated that 'it was an ordinary mode of procuring a little spending money to get a protection from a notary for a dollar and sell it to the first foreigner whom it all fitted for fifteen or twenty.' While there is no doubt that the British impressment had inflicted great hardship on *bona fide* American citizens. . . . the controversy never reached such a point that our Government was ready to make it a cause of war."

I make no comment on the above except to say that American historians are not agreed—and the facts may not be clear.—
W. R. R.]

IN THE *Army and Navy Journal* OF NOVEMBER 1, 1913, appeared an ARTICLE BY HON. LIEUT.-COL. ASA BIRD GARDINER, former professor of Law, U. S. Military Academy, West Point, of which the relevant parts follow:

In the *Army and Navy Journal* for July 10, 1913, appeared an article by Mr. Justice William Renwick Riddell, of the Appellate Division of the Supreme Court of the Province of Ontario, Canada, entitled, "Results of the War of 1812," in which he accepts the "proposition that the impressment of American seamen was an efficient cause of the War of 1812," but argues that it was futile and that the assertion of a claim of right on the part of Great Britain, as stated by Daniel Webster in 1842, "of impressing British subjects in time of war out of neutral merchant vessels and of deciding by her visiting officers who among the crews of such merchant vessels are British subjects," was in no way put an end to nor decided by that war.

It is a fact, however, that since that war no commander of a British warship has ever ventured to board an American merchant vessel for any such purpose.

Mr. Justice Riddell also quotes from Rear Admiral Mahan (Vol. IV., p. 431) a statement "that the United States came out with nothing better than the *status quo ante bellum*," as nothing was said in the Treaty of Ghent of Dec. 24, 1814, on the subject of impressment.

This statement as to results is, however, traversable.

The Americans then went to war for certain principles now engrafted in the Law of Nations which, despite Mr. Justice Riddell, they never abandoned.

* * * * *

It was not necessary to insert in the Treaty of Ghent anything about impressment, and discussion of the subject in later years was purely academic.

The fact was patent—the Americans would no longer submit to it as practised by the British, but would fight.

* * * * *

The fact that Sir James Graham, First Lord of the Admiralty, as quoted by Mr. Justice Riddell, expressly and emphatically reasserted in 1835 the right of the Crown to impress seamen is a matter of no consequence, such a right having been exercised as early as 1415 under Henry V., and even the Congress of the United States might, in its wisdom, in case of necessity, resort to such practice under the plenary constitutional authority "to raise and support armies" and "to provide and maintain a Navy," instead of by voluntary enlistment or draft.

Such statement is not disputed; but the *manner* and *locality* of exercising the right of impressment is a very different thing.

* * * * *

What the United States of America fought for in the War of 1812 have been attained and engrafted permanently in the law of nations, viz.:

1. That the independence and territorial sovereignty of the nation is inviolable.

2. That the national flag protects seamen on regularly documented American vessels against foreign impressment.

3. That the neutral flag covers enemy's goods with the exception of contraband of war.

4. That neutral goods, with the exception of contraband of war, are not liable to capture under an enemy's flag.

5. That blockades in order to be binding must be effective; that is to say, maintained by a force sufficient really to prevent access to the coast of the belligerent and preclude a reasonable chance of entrance.

These are the results of the War of 1812; but there is another to which Mr. Justice Riddell has not referred, but equally important, and that is the lasting respect and esteem which that war inspired between the officers and sailors of the British and American navies, shared in by their land forces—a regard ever growing during a century of peace, and continually manifested when in port or at stations together, as in the recent Chinese war.

Always fraternizing and going hand in hand, the two kindred services recognize closest kinship in language, constitutional principles of law—literature, customs and regulations of service—and now the two great English-speaking nations, thus united, conserve the peace of the world.

God grant that it may ever be so.

REPLY OF MR. JUSTICE RIDDELL.

(*Army and Navy Journal*, Nov. 29TH, 1913.)

SUPREME COURT OF ONTARIO,
APPELLATE DIVISION,
OSGOODE HALL, TORONTO,
November 18th, 1913.

TO THE EDITOR OF *The Army and Navy Journal*, NEW YORK:

DEAR SIR,—An article on the Results of the War of 1812 appears in the issue of the *Army and Navy Journal* for November 1st, 1913, which I have just received. There are in it a number of references to myself; but I should not trouble you with a letter were it not for what seem to me extraordinary and unfounded claims which regard for historical fact should not allow to pass unchallenged. When I challenge them, I do so with the one desire to obtain a knowledge of the real facts, independently of opinion: I am anxious to be corrected if wrong by being furnished with authority showing what is true.

Let me say a few words as to the references to myself. The learned writer must, of course, have misunderstood me in one instance, for a gentleman writing for gentlemen could not descend to the petty and silly practice of setting up a man of straw to knock down. It is said: "The Americans then went to war for certain principles now engrafted in the Law of Nations which, despite Mr. Justice Riddell, they never abandoned." When and where did I say or suggest that they did? I stated categorically as to one, and the only one then under discussion, of these principles—"No one suggests that the abandonment of the demand that 'impressment must cease by stipulation' was an acknowledgment by the United States of the justice of Britain's claim; but that this demand was abandoned is beyond all controversy." And I am wholly uncon-

scious of ever saying or suggesting that the United States ever acknowledged expressly or by implication that it was in the wrong in any of its claims.

What I did say was that when Admiral Warren was sent out, shortly after the declaration of war, he was told that an indispensable condition of even a truce was the abandonment of the practice of impressment, and this was refused by the British Government; that Russell, the American Chargé d'Affaires, suggested an armistice to Castlereagh on the same terms and he absolutely refused even to discuss the suspension of the right; that the Czar of Russia's well-meant mediation was refused by Britain for the same reason; that the instructions of the American Commissioners were peremptory, "impressment must cease by stipulation. If this encroachment of Great Britain is not provided against, the United States have appealed to arms in vain"; that when direct negotiations were begun with Britain the same confident tone was maintained.

This was early in 1814. Then the President was informed by the Commissioners of the state of public opinion in England, of the "ascendancy and views of Great Britain and the dispositions of the great continental powers," and forthwith took the advice of his Cabinet whether a treaty of peace, silent on the subject of impressment, be authorized. Colonel Gardiner says: "It was not necessary to insert in the Treaty of Ghent anything about impressment, and discussion of the subject in later years was purely academic." From Aug., 1812, till June, 1814, the only matter which stood in the way of peace was the insistence by the United States upon a stipulation by Britain to desist from her impressment; the American requests on the other matters in dispute were not "made indispensable conditions of peace." (Winsor, vol. VII., p. 483.) It surely cannot be said with any reason that the United States was pouring out blood and treasure for an academic point; it was a most real contention which it was making. How

did it come to be immaterial on June 27th, having been an indispensable prerequisite four days before? On June 23, 1814, Munroe wrote to the envoys at Ghent saying it was thought better not to continue the war "after the other essential cause of the war, that of impressment, should be removed." Before June 27, no treaty could be entered into without a stipulation on Britain's part; after that day such a stipulation was not necessary. Why? The *Army and Navy Journal* suggested that concessions were made by Britain which justified this omission. I can find none and had never heard the suggestion before. The Treaty is not long and it will speak for itself.

Was the discussion of the subject in later years purely academic? No one but an American would venture to say this of a matter the subject of warm debate in the Cabinet of Monroe—Adams, Wirt, Crawford and Calhoun, as well as the President, taking part; the subject of instructions to Ministers, taken up by Adams, Clay, Gallatin, Webster; the subject of messages to Congress of more than one President; and I ask again was all this elaborate fooling? Just think what Webster would have said had he heard the subject of some of his most splendid state papers and speeches described as academic! But, of course, that may be a matter of definition of terms.

The following sentence seems to be written by Col. Gardiner as a reason for saying the question was academic. "The fact was patent. The Americans would no longer submit to it as practised by the British but would fight."

No one (with negligible exceptions) supposed the Americans would not fight if they thought it worth while; no one supposed the breed had degenerated by crossing the Atlantic. Every one must exercise his own judgment as to how far it would render a subject academic for a nation to carry on war for two years on account of it and then drop it without a word when the other contending nation came into a position to bend its energies to the war.

This is not the place to speak of the respective victories and defeats. Some day the Colonel and I may don the blue and the scarlet and talk over the war. He will tell me of Sir George Prevost and I him of General Hull; he will speak of Scott, I of Brock; he will dilate upon Put-in-Bay and Moraviantown, I upon Detroit, Queenston Heights and Chateauguay, etc., etc., etc.—or he will hand me an American School history and I him one of Canadian origin.

Nor shall I enter upon the righteousness of the war, nor its real causes. For all purposes of this discussion, I accept the statement that impressment of American sailors was a real cause of the war—a whole contemporary political party and a whole school of American historians to the contrary notwithstanding. And the righteousness of the war is not here in controversy; we are concerned only with the results.

I should have had some complaint to make that the Colonel says: "The fact that Sir James Graham . . . as quoted by Mr. Justice Riddell, expressly . . . reasserted in 1835 the right of the Crown to impress seamen is of no consequence," were it not that, no doubt, the statement is due to my former letter not appearing in full.

The article in the *Journal*, June 7th, had said "Justice Riddell says the change was due to the alteration in the method of recruiting which the British Navy experienced with the downfall of Napoleon. This may well be true, but who shall say how large a part the War of 1812 had in bringing England to see the unwisdom of impressment and of the obnoxious system of press gangs?" It was in discussing this that I said: "You seem to say that the alteration in the method of recruiting with the downfall of Napoleon was the cause of the abandonment of the practice of impressment; but you add: 'Who shall say how large a part the War of 1812 had in bringing England to see the unwisdom of impressment and of the obnoxious system of press gangs?'"

This appears to be a claim that the war, while it did not directly bring about a cessation of the practice of impressment of American seamen, did so indirectly by causing a cessation of the practice of impressment altogether. If this were true I should be inclined to think the war was worth while.

"The claim or suggestion is to me quite novel; I can find nothing to support it."

Then the letter proceeds as it is printed. It will be seen what was the relevancy of my statement as to the continued claim of the Crown to impress.

With much respect and with a sincere desire to know the exact fact, I venture to suggest that the logical fallacy *post hoc ergo propter hoc* runs through the conclusions of the paper of Colonel Gardiner. He says, "it is a fact, however, that since that war no commander of a British warship has ever ventured to board an American merchant vessel for any such purpose"—he does not say as he might "since that war no commander of a British warship has ever ventured to board a British merchant vessel for any such purpose." Did the War of 1812 put an end to it, or was it the passing away of Britain's need?

My whole theme from the beginning has been the comparative futility of war for settling questions in dispute between nations. The indirect results of this war did not come within the ambit of discussion. Lossing mentions some, Mahan others; and it would be indeed a terrible thing if no good came out of the lavish expenditure of blood and treasure—some good comes out of an epidemic of cholera or the plague. If anyone thinks that the good feeling between the peoples is due to the war rather than to the century of peace, he has the right to his opinion. In my view the war did not increase or tend to increase the fraternity of the English-speaking peoples, but it checked the growth of that fraternity to no inconsiderable extent. My opinion may well be erroneous, but such as it is it comes from somewhat

extensive study of one branch of these peoples. That is opinion; and I ask no one to accept it.

But there are facts about which there should be no dispute, and about these I make enquiry.

Colonel Gardiner sets out what he says "the United States fought for in the War of 1812" and "what have been attained and engrafted permanently in the law of nations . . . the results of the War of 1812." Some of these claims are novel and none, so far as my reading of history and international law goes, is well founded. I must respectfully ask for authority for these claims other than mere personal assertion. The transactions were not done in a corner; almost everything is of record.

In considering the claims, I shall for the time being disregard the Orders-in-Council. The claims are five in number:

"1.—That the independence and territorial sovereignty of the nation is inviolable."

Of course it has become the conventional thing to say that the War of 1812 was the second War of Independence, that it was waged to complete the independence of the United States, etc., etc. I said in my previous letter that the accuracy of this depends upon the definition of the word "independence"; in the ordinary sense, it would be impossible to justify the statement. It was not because the United States had been colonies that the right to enter upon its ships was claimed, and certainly Britain had no more intention of attacking the independence of the United States than that of Spain or any other country. Wilkes boarded the *Trent* and took off Mason and Slidell; did either country imagine for a moment that this was an attack on the independence of Britain? In 1886 an American cutter seized three British ships sixty miles from the nearest land, took them with their crews to Unalaska, and there detained some of them in prison. Britain claimed redress and got it. Further seizures were made

in 1887. Britain did not suggest that her independence was attacked; and anyone would be laughed at who asserted that it was.

Nor did Britain imagine that she was attacking the territorial sovereignty of the United States. That this was inviolable no one denied and there was never any dispute about it. There was a dispute as to the extent of the territorial sovereignty just as there was as to the extent of the territorial sovereignty of the United States in the Bering Sea, the territorial sovereignty in the *Trent* affair. But is not to say that a principle that "the independence and national sovereignty of the nation is inviolable" was "attained and engrafted permanently in the law of nations" by "the War of 1812" a use of the English language wholly unknown to most English-speaking people?

If there was any foundation for the charge that the conduct of Britain was an attack upon the independence of the United States, how came it that nearly half the nation opposed the war most bitterly and many States refused to furnish men? Was Massachusetts, the mother of patriots, become the mother of copperheads, cowards and slaves? Was the war which Henry Adams said "nearly severed the Union," against which New England and New York voted, a war for independence? And when was the principle of inviolability of independence and territorial sovereignty either taken out of or "engrafted permanently in the law of nations"?

The second claim I have already dealt with by implication.

"3.—That the neutral flag covers enemy's goods with the exception of contraband of war."

So far as I know, this claim is wholly unfounded; the United States did not go to war for any such principle and it was not introduced into international law as a result of the war. "During the war . . . which commenced between the United States and Great Britain in 1812, the Prize Courts of the former uniformly enforced the generally acknowledged rule of international law that enemy's goods in neutral vessels are liable to capture

and confiscation except as to such powers with whom the American Government had stipulated by subsisting treaties the contrary rule that Free Ships should make free goods." (Wheaton, p. 627, sec. 471.) In *The Nereide* (1815), 9 Cranch, 388, Chief Justice Marshall, p. 418, says: "The rule that the goods of an enemy found in the vessel of a friend are prize of war, and that the goods of a friend found in the vessel of an enemy are to be restored, is believed to be a part of the original law of nations as generally, perhaps universally, acknowledged. Certainly it has been fully and unequivocally recognized by the United States." Kent in his *Commentaries*, written long after the war, says the same thing. (Vol. I., pp. 129-131.) The American Prize Courts during the Revolutionary War had followed the same rule. (Wheaton, p. 608.) And during the wars of the French Revolution the United States admitted that its flag, being neutral, did not cover enemy's property. President Jefferson, writing to Genet, the French minister, August 16th, 1793, says, in answer to a claim that French goods should be free on American ships, "on the contrary we suppose it to have been long an established principle of the Law of Nations that the goods of a friend are free in an enemy's vessel and an enemy's goods lawful prize in the vessel of a friend." He had said in a previous letter to Genet, of July 24th, 1793: "I believe it cannot be doubted but that by the general law of nations the goods of a friend found in the vessel of an enemy are free, and that the goods of an enemy found in the vessel of a friend are lawful prize. Upon this principle . . . the British armed vessels have taken the property of French citizens found in our vessels . . . and I confess I should be at a loss on what principle to reclaim it."

There is no word of any such claim as we are considering in the message of June, 1812. While no doubt the United States endeavored to have such a provision in all treaties, there was no pretence that the claim was

based on international law, and as Kent—writing in 1826—says (at p. 130), while “the rule of public law that the property of an enemy is liable to capture in the vessel of a friend is now declared on the part of our Government to have no foundation in natural right, and that the usage rests entirely on force,” he adds, “the authority and usage on which that right rests in Europe and the long, explicit and authoritative admission of it by the country have concluded us from making it a subject of controversy.” Woolsey, writing about 1871, says, sec. 185: “until very recent times the rule . . . that free ships make free goods was not settled.” “For a long time the prevailing rule was . . . enemy’s goods unsafe under any flag.” And he fixes the Treaty of Paris in 1856 as the time when the better rule became part of international law, at least for signatory powers. So long as the United States refrained from signing the Treaty, Woolsey says: “Nor could we, if we were neutrals, carry the goods of either enemy upon our vessels, for the four articles do not apply except to the signers of them.” “However solicitous America might be . . . to obtain the concession of this principle . . . she had never conceived the idea of obtaining that consent by force.” (Wheaton, p. 611.)

Surely it cannot be seriously contended that the United States were guilty of the inconsistency and hypocrisy of going to war to enforce a law diametrically opposed to that laid down and administered by its own Courts before, during and after the war, or that a result of such war is a change not made till forty years afterwards.

“4.—That neutral goods with the exception of contraband of war are not liable to capture under an enemy’s flag.”

It is hard to think that this is seriously intended. Both before and during the war this was the law of England—Chitty’s Law of Nations, 1812, p. 111—and it was enforced by the Prize Courts in England during

this very war. For example, in the case of *The Cygnet* (May 2nd, 1813), 2 Dodson's Admiralty Reports, 299, a British man-of-war had taken an American privateer which had Spanish goods on board; the cargo was sold and the judge ordered seven-eighths to be paid to the Spaniard and one-eighth to the captors as salvage. On appeal, Sir William Scott (Lord Stowell), held that the whole proceeds must go to the Spanish claimant without allowing even expenses.

The doctrine that neutrals' goods were seizable on board an enemy's ship was "unknown to and unpractised by British Courts." (Phillimore, International Law, Vol. III., sec. 166, p. 310.)

"5.—That blockades in order to be binding must be effective, that is to say, maintained by a force sufficient really to prevent access to the coast. . . ."

There was never any dispute as to this. Sir William Scott (afterwards Lord Stowell) had, in 1798, laid it down as clear law that there must be "a number of vessels stationed round the entrance of the port to cut off all communication." *The Betsey*, 1 C. Rob. 93. In 1800 the question in controversy was not whether a blockading force should be capable of completely investing, but whether a temporary absence raised the blockade. (Moore, sec. 1269.) In 1803 an incomplete blockade by a British Admiral of Martinique and Guadeloupe was countermanded on the facts being represented to the British Government by the United States. (Mahan I., 99.) What was claimed by the United States and the result of the claim may be seen from a few extracts from Mahan which I subjoin:

"There was no difference between the two Governments as to the general principle that a blockade to be lawful must be supported by the presence of an adequate force . . . the difficulty turned on a point of definition as to what situation and what size of a blockading squadron constituted adequacy. The United States based themselves resolutely on the position that the blockaders must be close to the ports named for closure

and denied that a coast line could be thus shut off from commerce without specifying the particular harbours before which the ships would be stationed." (Mahan I., 110.) What were called the "new" principles of blockade which Britain was called upon to renounce were "that unfortified ports, commercial harbors, might be blockaded, as the United States a half century later strangled the Southern Confederacy. Such blockades were lawful then and long before." (Mahan I., 242—) "The United States have received their lesson in history. If the principles contended for by their representatives Marshall and Pinkney had been established as international law before 1861, there could have been no blockade of the Southern coast in the Civil War." May 31st, 1814, a proclamation was made by Britain of blockade of the coast of the United States from New Brunswick to Florida; this "was a clear defiance, in the assurance of conscious power, of a principal contention of the United States that the measure of blockades against neutrals was not legitimately applicable to whole coasts, but only to specified ports closely watched by a naval force competent to its avowed purpose." (Mahan II., 11.) "The American *projet* . . . consisted of articles embodying the American positions on the subjects of impressment and blockade . . . These demands which covered the motives of the war . . . were pronounced inadmissible at once by the British and were immediately abandoned. Their presentation had been merely formal; the United States Government within its own Council Chamber had already recognized that they could not be enforced." (Mahan II., 432.) Let me only add that less than a month after the last blockade spoken of above the United States gave instructions to their Commissioners to abandon the only claim which stood in the way, and had from the beginning of the war stood in the way, of peace negotiations.

So far I have said nothing about the Orders-in-Council. These were admittedly not justified by the law of

nations. Britain based them upon the illegal measures of Napoleon and sought to justify them by alleging the acquiescence of neutrals in the illegal measures of her opponent. Mahan points out that the prohibition against entering certain ports was not because they were blockaded, but "as if the same were actually blockaded." There was no attempt to change the law of blockade, but Britain claimed that by reason of neutral nations submitting to Napoleon's decrees, she had a right to compel them to submit to similar decrees on her part.

Sir William Scott (1812), *The Snipe*, Edwards Ad. R., 381, says, "these orders were intended and professed to be retaliating against France; without reference to that character they have not and could not be defended, but in that character they have been, justly in my apprehension, deemed reconcilable with those rules of natural justice. . . ."

This was probably bad law and certainly bad morals. The obnoxious Orders-in-Council admittedly violated international law; but they were a war measure, and they were repealed a few days after the declaration of war, before any news of it could get across the Atlantic and before any steps of aggression were taken in the war. I have consequently not supposed that anyone could or did contend that the war was carried on for anything contained in these Orders-in-Council, or that the repeal was in any wise a result of the war.

That the war was not carried on as a result of anything contained in the Orders-in-Council is made especially clear when we remember that when the Peace Commissioners came together "the American *projet* . . . consisted of articles embodying the American positions on the subjects of impressment and blockade with claims for indemnity for losses sustained by irregular captures and seizures during the late hostilities between France and Great Britain; a provision aimed at the Orders-in-Council. These demands which covered the motives of the war and may be regarded as the offensive side of

• the American negotiation, were pronounced inadmissible at once by the British and were immediately abandoned." (Mahan II., 432.)

Let me conclude by joining most cordially in the aspiration for perpetual peace and friendship between the peoples and by expressing the hope that no one will think it necessary to have another war to increase mutual respect and fraternal feeling—on that theory we should have a war at least every generation.

I am,

Yours very truly,

WILLIAM RENWICK RIDDELL.



FROM THE TRANSACTIONS OF THE ROYAL SOCIETY OF CANADA

THIRD SERIES—1913

VOLUME VII

**PRACTICE OF COURT OF COMMON PLEAS OF
THE DISTRICT OF HESSE**

By

The Hon. Mr. JUSTICE RIDDELL, L.H.D., LL.D., Etc.

OTTAWA

PRINTED FOR THE ROYAL SOCIETY OF CANADA

1913

Practice of Court of Common Pleas of the District of Hesse.

BY THE HONOURABLE MR. JUSTICE RIDDELL, L.H.D., LL.D., &c.

PRESENTED BY C. C. JAMES, C.M.G., LL.D.

Read May 28, 1913.

A sketch of the first Puisne and fifth Chief Justice of the King's Bench in Upper Canada has been written by the late D. B. Read, Q.C.; it appears in the Magazine of Western History, Vol. 5, p. 375 (1887), and is included in his "Lives of the Judges."

Mr. Read mentions the fact that Powell sat in the Court of Common Pleas at L'Assomption on August 11th, 1791: and says that this appears from the "Archives at Osgoode Hall." The particular volume from which the account is quoted is no longer to be found at Osgoode Hall;* but recently in going over the vault of the King's Bench for an entirely different purpose, I found a volume containing a record of earlier judicial acts of the future Chief Justice. This volume naturally escaped Mr. Read's notice, as it purports to be Volume 10 of the King's Bench Term Books. It is of foolscap size, a parchment bound volume: while the middle part is taken up with the proceedings in Term of the King's Bench from November 3rd, 1828, to July 1st, 1830, a number of pages, both at the front and at the back, contain a record of the proceedings of the Court of Common Pleas holden at L'Assomption (the word is spelled with an "o" not "u" in the original). The record begins July 16th, 1789, and continues till September 24th, 1789: then (reversing the volume) the record is from May 19th, 1791, to August 4th, 1791, at which day the Court was "adjourned to 11th inst." The volume cited by Mr. Read is a continuation of this. Some 36 pages are cut out from before the record of May 19th, 1791—which may have contained the proceedings from September, 1789 to May 1791.

The history of the Court is not without interest.

In the Royal Proclamation of 7th Oct., 1763, it was stated that until Assemblies should be called, "all persons inhabiting in or resorting to our said Colonies, may confide in our royal protection for the enjoyment of the benefit of the laws of our Realm of England"—and the Governor was instructed to "constitute and appoint Courts of Judicature

*This volume is now in the Ontario Archives, and contains the record from August 11th, 1791, to October 20th, 1791—there is also another volume in the Archives containing the record from October 27th, 1791, till January 26th, 1792.

and Justice" for that purpose. The "Quebec Act" of 1774 (14 Geo. III, c. 83) reintroduced the French law in Civil matters, leaving the English criminal law still in force.

The Royal instructions to Carleton, the Governor, advised him to constitute a Court of King's Bench for all Crown cases; and a Court of Common Pleas in each of the Districts of Montreal and Quebec to decide all civil suits and actions—further that in addition to these Courts for the Province at large, there should be an inferior Court of Criminal and Civil jurisdiction in each of the Districts of the Illinois, St. Vincenne, Detroit, Missilimakinac and Gaspée, with authority to determine all matters, civil and criminal—the Courts to be called the Court of King's Bench for such district, and each to have one Judge, a native born subject, and an Assistant or Assessor, a Canadian, to give advice to the Judge but to have no voice in the decision. The only limitation to the jurisdiction of these Courts was that in cases of Treason, Murder or other Capital Felonies, the local Court could only arrest and commit to the gaol at Montreal or Quebec for trial there. While these Courts were in that part of the Instructions called "Courts of King's Bench" they are in another part called "Courts of King's Bench and Common Pleas." Provision is made for the payment to the Judge of each of these five local Courts a salary of £100 and "to an assistant or assessor at each post . . . £50 per annum." This was in January, 1775.

Courts were accordingly established by Carleton in 1776 in Quebec and Montreal; but the troublous times of the Revolution then set in and Courts were a useless anomaly for the time being.

The Revolutionary War resulted in the loss of much of the western territory; and the five Courts were not necessary as most of the country they were intended to serve had ceased to be British. Therefore we find that in the Royal Instructions to Lord Dorchester of 23rd August, 1786, the provision for the salary of these Judges and assistants disappears. On July 24th, 1788, Dorchester issued a proclamation making a new District Gaspé to the far East and dividing all Canada west of what was afterwards called Lower Canada, into four Districts, Luneburg (not Lunenburg as it is generally spelled), Mecklenburg, Nassau and Hesse—Hesse included Detroit. A Court of Common Pleas was established in each of these Districts—and it was in the Court of Common Pleas in and for the District of Hesse* in the Province of Quebec that

*This was not the first attempt to form a Court for the District of Hesse. Contemporaneously with the proclamation of July 24, 1788, Dorchester appointed as Justices of the Common Pleas the following gentlemen of Detroit: Alexander McKee, William Robertson and Dupéron Baby. In this he followed in principle the advice contained in sec. 15 of his instructions of 3rd January, 1775—he was there advised to erect in each of the Districts of Montreal and Quebec a Court of Common Pleas and "that there be three Judges in each of the said Courts of Common Pleas, that is

Powell sat as the first Judge and exercised civil jurisdiction with his headquarters at Detroit. In addition to this, he received, more than once, a Commission of Oyer and Terminer and General Gaol Delivery under which he sat to try criminal cases. He was to sit under such a commission in Kingston about the time the Act, 31 George III, c. 31, dividing Quebec into Upper and Lower Canada came into force and it was feared that he might refuse to sit in consequence of certain irregularities; he did not refuse to sit but showed his good sense by ignoring technicality.

Before this date he had been appointed to the Court of Common Pleas for the Hesse District; he arrived at Detroit in June, 1789, and seems to have opened his Court at L'Assomption (Sandwich) July 16th, of the same year.

In the practice of this Court a distinction was made between claims under £10 sterling and those £10 and over—the smaller claims

to say two of our natural born subjects of Great Britain, Ireland, or our other Plantations, and one Canadian." This course he had followed in his appointments to the Courts at Montreal and Quebec—and he adopted the same principle for Detroit.

Alexander McKee, a native of Pennsylvania, had been from 1772 on, Deputy-Agent of Indian Affairs at Fort Pitt (Pittsburg) and was undoubtedly enthusiastically loyal to the Crown. He was a J.P. and carried on a large and lucrative business before the outbreak of hostilities between the Colonies and Motherland—imprisoned by General Hand in 1777, he was released on parole—being threatened with imprisonment the following year, he made his escape to Detroit with Simon Girty and others. Thereafter he took a most active part on the loyalist side and was made a Colonel. He went into business in Detroit and was appointed Deputy-Superintendent of Indian Affairs, afterwards in 1794 Superintendent-General. He was appointed in 1789 a member of the Land Board of Hesse and was granted land—he died in 1799.

William Robertson was also a resident of Detroit—he became a member of the Land Board which held its meetings for some time at his house. He sat on the Board till August, 1790, when he left for England. His name appears as heading the list of the Land Board of the late District of Hesse to be limited to the Counties of Essex and Kent only—being now the Honourable William Robertson—but he did not attend any meetings of that Board. He had been appointed a member of the Legislative Council of Upper Canada in 1791, but never was sworn in, nor did he come to Canada to take his seat. He resigned shortly afterwards.

Duperon Baby was of an old French-Canadian family; born in 1738, he became a prominent citizen of Detroit and a trader of great enterprise. He also was appointed a member of the Hesse Land Board, and rendered valuable services in interpreting. He died at Sandwich in 1796.

These appointments were very unpopular, for one reason because the appointees were not lawyers: a protest was drawn up and Robertson and Baby carried this to the Governor of Quebec, presenting it October 24th, 1788. It was pointed out that Robertson and Baby were so extensively engaged in trade—Baby being the only French fur trader—that they would be personally interested in ninety per cent. of the cases—and it was suggested to create a Court of Common Pleas with one Judge, a lawyer, who would devote all his time to the duties of the office. This was done—the former appointees never acted—and Powell was the first Judge as we have said.

being disposed of by a simpler procedure. This simpler and summary procedure was abolished in 1792 by the Statute, 32 George III (U.C.), c. 4, on the introduction of trial by jury in all civil cases, 32 George III (U.C.), c. 2. But debts of 40 shillings and under, Quebec currency (*i.e.* \$8), were made suable before Magistrates in Courts of Requests, provided for by c. 6 of the same Statute. In 1794, the first Parliament of Upper Canada in its third session, 34 George III, c. 2, abolished the Courts of Common Pleas altogether, created an entirely new Court of King's Bench, removed all cases pending in the Common Pleas into the King's Bench; and also all the records of the several Courts of Common Pleas were made records of the King's Bench. No doubt this provision accounts for the note-book to which I have referred being used afterwards in the King's Bench in Term.

The Act of 1794 provided for one Chief Justice and two puisnes. William Osgoode had already been in the Province of Upper Canada for some time with a Commission from the King as Chief Justice; Powell was made a puisne Justice the day of the Act being approved, 9th January, 1794; and the Hon. Peter Russell, a Legislative Councillor, received a Commission several times in a temporary emergency; but a second permanent puisne was not appointed until November 30th, 1798, when Henry Alcock became the junior puisne.

It is time now to return to the Court at L'Assomption. In all the cases tried I can find a reference to only one Attorney,* Walter Roe; he appears for the plaintiff in most of the cases. When he does not appear we find Charles Smyth "acting by procuration for the plaintiff," or sometimes the plaintiff in person. Thomas Smith† was the Clerk.

*Walter Roe was during the Revolutionary War, Warrant Officer in the Marine Department. He was afterwards, in 1790, given Lot No. 25 in the Two Connected Townships (afterwards Colchester and Gosfield). He was practicing at the bar in the Courts at the time of the passing of the Act of 1797, 37, Geo. III (U.C.), c. 13, establishing the Law Society of Upper Canada, and was accordingly qualified to become a member. He did so, being the third person to sign and immediately after the Attorney-General John White and the Solicitor-General Robert I. D. Gray. He appeared in the K.B. in Term at least once, July 17, 1797. In Michaelmas Term, 59 George III, Nov. 10th, 1818, at a Trial at Bar before Powell C. J., Campbell & Boulton JJ., of an action in ejectment, *Doe dem. Dickson v. Penfield*, Mr. Roe was called as a witness but did not answer. The jury found for the plaintiff (William Dickson).

†Thomas Smith was a loyalist of Welsh birth. In 1776 he came to Niagara with intelligence concerning the revolting colonists; and afterwards settled in Detroit. After the Peace he was, in 1789, made Clerk of the Land Board of the District of Hesse with Headquarters at Detroit—this situation he lost the next year. He had previously acted as Deputy-Surveyor from 8th May, 1787, and continued to act to 1st August, 1789. He received in 1790, 200 acres of land, Lot 30 in the First Concession of the Two Connected Townships. He seems to have been accused of

The currency is very varied—sometimes Quebec, Halifax or Provincial currency, or currency of the Province—in this £1 equals \$4 of our present money, and 1 shilling equals 20 cents; sometimes New York Currency—in this £1 equals \$2.50 of our present money, and 1 shilling (known even in my day as a “York shilling,” or “Yorker”) equals 12½ cents; sometimes livres and sols, the old Canadian French currency—according to a proclamation of Lieut. Col. Irving, 5th July, 1765, 24 livres equal £1, making the livre equal 18½ cents (about).* The “Upper Canada Act” of 1796, 36 George III, c. 1, makes the livre equal 11 1/9 pence Canadian Currency (equal 18½ cents, about). A computation by the Clerk in one case makes the livre equal 17 cents (about). Probably the valuation was somewhat elastic—the livre in any case is about one franc.

The practice of the Court is very interesting from a historic point of view. In a case of £10 or over, “The plaintiff by his attorney, Walter Roe, filed his declaration.” The defendant is called—he generally appears in person. He may admit the debt, in which case judgment is entered up against him—or he may claim a set off. If this be admitted by the plaintiff, judgment is entered for the balance. For example, July 23rd, 1789, Meldrum and Park sue Dominique LaBrosse, of the Parish of St. Anne, the declaration is filed, the defendant appears and acknowledges the debt, but claims an account for work done for the plaintiffs to the amount of 180 livres ancient currency of Quebec. Judgment is recorded against him for the balance.

Or the defendant admits the debt, note or otherwise, but objects that he never agreed to pay interest—a day is set some time

selling the King's lands, and demanded an opportunity of justifying his conduct—there seems to have been nothing in the charge.

In July, 1792, we find him with Elliott and Girty accompanying a deputation of upwards of twenty Indians who waited on the Commissioners of the United States, who were on an island in the Detroit River, and demanded an explicit answer to the question whether they were authorized by the United States to fix the Ohio River as the boundary between the Americans and the Indians.

In August, 1792, he was granted Lot No. 12, First Township, North Side River La Franche (Thames)—and next month Lots Nos. 49 and 50 on the Petite Cote. In 1796 he was elected member of the Legislative Assembly (the Second Parliament of Upper Canada) for Kent, but continued to reside at Detroit for some time, practising as a surveyor. He died at Sandwich in 1833. In one of the documents preserved of the Hesse Land Board, he is described as “Lt. M.” i.e., Lieutenant in the Militia, and it seems clear that he actually had that rank.

*The pound sterling was considered equal to \$4 4/9—that is the “old par” and is still the nominal par. E.g., when sterling exchange is at intrinsic and actual par—that is the pound sterling is equal to \$4.8667—exchange is said to be 9½ per cent. premium (1.09½ of 4 4/9 equals 4.8667).

afterward for the plaintiff to prove his demand—or the defendant admits his signature to a note, but says he was an infant at the time of signing it—then a day is fixed for him to “prove his allegations.” The plea may be clearly bad in law—as when James Heward, of Detroit, Labourer, sues Thomas Heward, of the same place, Gentleman, for wages, and Thomas appears and saying that the debt is justly due and owing, pleads that he hired James, acting as agent for the Miami Company at Sandusky. There being no pretence that James knew anything of this, judgment was entered against Thomas for £14 - 1 - 3 “reserving to the defendant his recourse for repayment from his Employers.”

And, 19th May, 1791, “George McDougall vs. Jacques Campeau,” Roe filed the declaration, the defendant appeared in person and for “a plea says that he expected the plaintiff would wait for payment, as he had not wherewithal to satisfy him—especially as his land was mortgaged for the money.” These are, no doubt, perfectly satisfactory reasons for not paying, especially the first—but the law is inexorable, and as the “defendant acknowledged the obligation,” “judgment was directed to be entered against him for £165 - 16 - 8, Hfx., and interest with costs.” These are taxed at £9 - 6 - 6, Hfx. “Hfx.”, of course, means Halifax or Quebec currency.

The defendant may appear in person and deny all liability. He may be allowed to plead before a certain time or a day may be set for the plaintiff to prove his demand. Very rarely, indeed, the defendant’s Attorney Walter Roe, or Charles Smyth, by procuration, enters an appearance; sometimes, too, the defendant himself “enters appearance.”

If the defendant upon being called three times, do not appear in person or by Attorney, “it is ordered that a default be entered against him.” That does not mean that judgment is entered for the plaintiff, however—the defendant has another chance—he may appear at the next Court and plead—or fail again to appear, in which case a second default is entered against him, and a day fixed for the plaintiff to proceed to proof. Let me give an instance. In the case of “Richard Dobie, of Montreal, Merch’t., v. John Martin, of Detroit, Merch’t., on July 16th, 1789 “the plaintiff by Mr. Roe his Attorney, filed his Declaration, and the Defendant being called thrice and not appearing, It is therefore ordered that default be entered against him.” At the Sittings of July 23rd 1789 “Mr. Roe the Attorney for plaintiff, informed the Court that this action was continued last Court day and that the defendant had been then thrice called and not appearing, and a Default was recorded against him. The Defendant now being called again and entered appearance and declares he is not in-

debted in the sum as set forth in the plaintiff's declaration. The Court ordered the plaintiff to prove his demand on the 20th of August next." On August 20th "This action was continued the 23rd of July last for the plaintiff to prove his Demand this day—in consequence Walter Roe, Attorney for the plaintiff filed his Replication the 18th inst. in the office. The Defendant being now thrice called and not appearing thereupon, the plaintiff's Attorney moved for judgment, the Court ordered the action to continue for eight days *en Delibere*, and a second default entered against Defendant." "Eight days" in those days meant a week. On August 27th "Walter Roe, Attorney for the Plaintiff—the defendant being thrice called and not appearing." Then appears what we should call reasons for judgment or the opinion of the Court, thus,

"District of Hesse	{	This is an action the Gist of which is a record of judgment in another Court:
--------------------	---	---

to this the Defendant has pleaded that he owes nothing, but as he has set up no payment or release of judgment, I must presume the meaning of his plea to be the proper issue and a Traverse of the Record of judgment. It seems so to be understood by the Replication of the Plaintiff, who again relies upon and proffers the Record. The Evidence filed is equally insufficient to support the action upon the Rules of Evidence either of the ancient or present Laws of the Province, the office copy of the Record being neither upon Parchment or under seal. Wherefore the Court considers that judgment be entered as in case of a nunsuit."

I do not stay to point out the accuracy or otherwise of the Judge's law; but hasten to another case which is thus intituled:—"John Robert McDougall, of Detroit, Gentleman, vs. Isaac Germain." On July 16th, the inevitable Walter Roe filed his declaration and the defendant had a default entered against him: on July 23, the defendant again did not appear, a second default was entered against him and the defendant directed to proceed to prove his demand on the 20th August—on August 20th the defendant did not appear and the plaintiff "by his Attorney Walter Roe" called evidence. It was proved that the defendant put certain cattle for agistment upon the plaintiff's land on Hog Island, agreeing to pay well for them, also that 20 shillings a head was the usual price on the Island—"This action is continued and remains *en Delibere* for eight days." On the 27th judgment is entered up for

£30 - 9 - 6

and £9 - 9 - 5 costs, in all £39 - 18 - 11

and a Writ of fi. fa. issued 5 - 0

£40 - 3 - 11

And an alias *fi. fa.* was issued Oct. 2nd for this sum—which writ was returnable the first Court day in June 1790—for

£40 - 3 - 11 and subsequent costs,
£ 1 - 15 - 0

£41 - 18 - 11

The costs seem fairly large; it may be that the Clerk did not tax too stringently—in that respect being unlike a certain English taxing officer. Mr. Quirk, of Quirk, Gammon & Snap, had, we are told, “never been seen actually to shed a tear but once—when five sixths of his little bill (£196 - 15 - 4) were taxed off in an action on a Bill of Exchange for £13.”

In cases under £10 sterling there does not seem to have been any declaration or written pleading but otherwise the practice does not differ from what I have described.

A somewhat curious feature is that the evidence, given as it is, sometimes in English, sometimes in French, is taken down in the language employed by the witness—the orthography in neither language is unexceptionable and the syntax of the French sometimes is very bad—no doubt what appear to be solecisms are really the expressions of the witnesses themselves. The faulty orthography is just that of a man who understands French as spoken, but has no need to write it.

For example, on May 26th 1791, in *Graham v. McKenzie v. Louis, Campeau*, Mr. Roe appears for the plaintiffs: the defendant made default. J. B. Marin was called as a witness and he deposed as follows: (I give the original French and all) “*Qu’il est commis actuelment employer par le Demandeur et que de leur part il fut Dimanche dernier chez Defendeur pour lui demander sa raison pour avoir pas acquitté la demande actuel. Pour reponse le Defendeur a dit au Tremoin que ce est bien vrai que lui devoit le vinght trois Ponds pour une Quart* de Romme qu’il a eut tête passé mais peut pas faire ceste somme bien qu’il avoit demander en plusier maison.*” Accordingly judgment went for £23 - 16 - 0, N.Y. Cy. with costs—and the formal judgment for £14 - 17 - 6, and costs £6 - 8 - 2, in all £21 - 5 - 8, Provincial Currency. The computation here is exact—the judgment was for \$59.50 of our present currency.

Dollars were not wholly unknown in those days: at a Court holden at L’Assomption, 9th June, 1791, in a case *Samuel Edge v. John*

* This does not mean what we call a quart of rum—the “Quart” as is shown in another case was “more than 30 gallons”—so that the “Romme” cost less than \$2 a gallon.

Vert, judgment was given that the defendant should pay four dollars and a half and costs.

Some other cases are worthy of note—for example, as shewing an “Equity” practice in this Court of Common Pleas, at the Court held 19th May 1791 in the case of *George Lyons v. Francois Chabut Esquire*, we find the following as the proceedings: “That the plaintiff having this day filed the affidavit of James May purporting that the best and only witness to prove his demands are without the jurisdiction of this Court, and being willing to refer the said demand to the decisive oath of the defendant, prays that a rule may be personally served on the said Francois Chabut, Esq., requiring him to attend this Court in his proper person on Thursday the 9th of June next, then here to purge himself by his corporal oath from his said demand, failing whereof it shall be admitted and taken *pro confesso*. The Court order accordingly.”

On June 9th the defendant did not appear, the declaration was taken as confessed and judgment was entered “for £26 - 10 - 4, currency of New York, equal to £16 - 11 - 5 currency of Quebec, with costs. The costs were taxed at £6 - 11 - 5 currency of Quebec, *Fi. fa.* was issued and the money made in full (there is a trifling error in calculation £26 - 10 - 4 N.Y. currency is equivalent to £16 - 15 - 2½ Quebec currency).

On the 20th August 1789, in the action of *Thomas Cox v. Guillaume Gyeaux of L’Assomption*, “Walter Roe for the plaintiff filed his Declaration and the Defendant appeared in person:—

“As judgment was rendered the 23rd of July last against the Defendant and Execution the 24th of August, and finding by the Return of the Sheriff that the Defendant’s Goods and chattels, Lands and Tenements are not sufficient to satisfy the said judgment creditor, and the plaintiff’s Attorney suspecting that the defendant had property secreted in the hands of Joseph Pilet, he was therefore summoned before the Court to give his declaration on oath, whom being called and duly sworn and declared to have no effects of the Defendant’s in his hands at this time, nor have had at the time of the service of the Declaration.”

August 20th 1789 “*Isaac Dolson of L’Assomption, Yeoman, vs. Joseph Perrier, dite Vadeboncœur of the River of Ecosse, Walter Roe Attorney for the plaintiff*, filed his declaration and the Defendant being called and appeared in person and acknowledged that the plaintiff was in peaceable and quiet possession of the land in question, and that he did enter upon the premises in manner and in form as set forth in the Plaintiff’s Declaration, which being duly considered, the Court ordered the Defendant to put the Plaintiff immediately in pos-

session of the said Premises [this is what we should now call an "Interim injunction."] and the action to be considered in the meantime." On August 27th, on consent, a continuance was ordered for eight days; on Sept. 3rd the defendant not appearing the case was again "continued at the instance of Mr. Roe": on Sept. 10th the defendant still not appearing, the Declaration is set out and a judgment entered for re-entry and £9-17-0 currency of the Province for costs.

August 20th "James Fraser, Attorney to the Assignees of Thomas Cox vs. Pierre La Bute, Walter Roe for the Plaintiff filed his Declaration and the Defendant being called and appeared in person—and after some altercation, Mr. Roe the Plaintiff's Attorney moved to discontinue the suit. The Court ordered the suit to be discontinued accordingly."

July 23rd "Leith & Shepherd of Detroit, and Copartners in Trade vs. Jean Bte. Leduc, fils, of the Parish of L'Assomption, Yeoman." The Defendant admitted his signature to the note, but pleaded infancy. He was ordered to prove his plea and on Aug. 20th he "produced his *Batistere*", which proved that he was not a minor at the time of signing the note. His further plea that it was for his father's debt was equally ineffective and judgment went against him for note, interest and costs.

August 20th, "Frederick Arnold vs. J. Bte. Leduck fils, Walter Roe Attorney for the Plaintiff and the Defendant appeared; and by consent of parties, Claude Rheaume and Isaac Dolson, is nominated to estimate the damages in the Detention of the plaintiff's horses, and to call in the third person in case of Differences, reserving to the Court the right of imprisonment of said horses and to report in eight days." The action was, Aug. 27th, continued for eight days; Sept. 3rd "the Court took into consideration the Report of auditors upon the matter in dispute who were nominated by consent of the parties to report on their differences" and entered judgment for the plaintiff, that Jean Bte. Leduck fils should pay him the sum of £10 of the currency of New York, equal to £6 - 5 currency of Quebec (the computation here is exact).

September 3rd "Magdalaine Peltier, spouse of Jaques Peltier, vs. Laurent Maure. The plaintiff filed her Declaration and the Defendant appeared in person. The Court having taken the matter into consideration and find that the plaintiff is under coverture and not authorized by a Letter of Attorney from her husband. It is ordered that the action be dismissed."

Sept. 3. "Antoine Jalbert v. Jonathan Schiffelin, Charles Smyth, Attorney for the Plaintiff by Procuration filed his Declaration. The

Defendant appeared and says that he owes nothing to the Plaintiff, but that he is indebted to him Two hundred and Thirty-one Livres, for which he prays to become an incidental Plaintiff, and filed the Plaintiff's engagement subscribed by him at Detroit and offers to bring proof that the defendant did not perform his engagement, and also files the account, items of which he begs leave to prove." On the 10th he called "John McGregor of full age and not interested" but all he said was "that he does not know anything respecting the matter in Question." Then he called Raphael Bellongir who said "*Que lui ettoit en compagné avec Antoine Jalbert quant le dite Jalbert avoit laisser le service du Defendeur le dix septieme de mai.*" The case came on again Sept. 17th, when judgment was given dismissing the action with costs. It seems that Jalbert claimed that he had been employed by Schiffelin to go into the Indian Country to Saginan an Indian Post, to help him in the fur trade, but was discharged by him and accordingly claimed £20 - 16 - 8, Halifax currency, as wages—the defendant set up that Jalbert did not perform his engagement, and he claimed 231 livres as due him by Jalbert. Nothing is said in the judgment about this counterclaim.

August 27th. "Catherine Desriviere La Moinodiere Deguindre vs. Her Husband, Antoine Dagnio Deguindre" Declaration filed, defendant noted in default: Sept. 3, second default, Sept. 10 defendant still in default. Plaintiff ordered to produce her evidence next Court day at 9 o'clock in the morning: Sept. 17, the defendant being again absent, the plaintiff produced her marriage contract and called witnesses who gave evidence in French—I give a sample:—

"Question 2nd. by Mr. Roe—*Si lui connait les Ettat de ces affaire?* Ans. *Que non.*"

"Question 4th by Mr. Roe:—*Avez vous entendu dire que-ce meubles ettes vendû, et par quil?* Ans. *Que lui avoit entendû dire que l'ont ettè vendû a L'Ençon.*"

"Question 5th by Mr. Roe:—*Si l'ont ettè vendû par le Sheriffe?* Ans. *Je ne sai pas.*"

This is rather better than the French in another place "*il se pas.*"

There is considerable evidence about "*une Seizer au chez le Defendeur;*" and then the case stands over till next Court. Sept. 24th it again stands over for eight days—and the record of all further proceedings is lost.

Sept. 3. In *Thomas Cox v. William Gyeaux*, the Sheriff had made a seizure but could not proceed with the sale till "the claims of the different opponents are first satisfied and paid or secured upon the proceeds."

Nicholas Gyeaux, nephew of William, produced witnesses who testified that he "*a proposer seminez la Terre de son oncle a motie*"

and the witness "croix dans sa conscience s'été a mottier entre l'oncle et nephew."

So he got half of 12 bushels of oats, 12 of wheat and one of Pease, the other half to go to the Sheriff.

Charles Prout produced a witness who swore that the defendant and Prout "lui avez dit que ce derniere été en Simmenser chez le premiere une Piece de Bled Fromment et une Piece de Voine a son proper profit"—and so Prout got his wheat (blé froment, what is called in the book bled fromment) and the proceeds of an Indian Corn patch, the oats (voine i. e. avoine) no doubt also.

Louis Gyeaux offered his brother Nicholas as a witness, the plaintiff's Attorney, the ubiquitous Mr. Roe, objected on the ground of relationship, but this objection was overruled—and he proved the case well: "son oncle Guillaume Gyeaux lui a dit que une de ce vache ettoit a Louis Gyeaux que lui a livre la vache a son Frere que lui a laisser sans le Park le opposent avec les otre animaux de Defendeur, et que cette vache et une de cette prix en execution." That settled it—Louis got "cette vache."

Alexis Maisonville did not succeed in his claim (perhaps the defendant's family name was Goyeaux, a well-known name of those parts).

The same day Phillip Fox obtained judgment against Pierre Durand "that he return the meat of a Hog which he killed, belonging to the Plaintiff (or to pay him three pounds New York currency)—and Francis Latour obtained judgment against Louis Trudell that he pay Ten Pounds currency (or return to the Plaintiff Four hundred and fifty Pounds of Flour).

Sept. 10th Jacques Peltier, whose spouse Magdelaine had failed in her action against Laurent Maure the week before now sues him, himself, and gets judgment for £27 - 10 - 0 currency for rent of a house.

Sept. 10th "Hyacinthe Latourelle v. William Groesbeek: The parties appeared and the defendant is ordered to give to the plaintiff his account before eight days; and then if the Defendant falls in debt to the plaintiff he has a recourse to the Court"—and September 17th "the Plaintiff is dismissed from his action and to pay costs of suit." What the order of Sept. 10th means I cannot say.

Sept. 10th "John Urquhart of Detroit, Gentleman v. John Askin of Detroit, Merch't, Walter Roe Attorney for the Defendant entered appearance and Charly Smyth acting by Procuration for the Plaintiff, declined to act any further in his behalf" and the Plaintiff, therefore, was thrice called and not appearing "judgment went against him with costs."

Sept. 17th a defendant Joseph Barron of St. Anne got 15 days delay "on account of his family being in a bad state of health." Sept. 24th Isabella Maholm (almost certainly "Malcolm") complains that her husband James Donaldson detains £50 sterling in his hands sent to her by her friends in Scotland. Mr. Roe for the husband "denies to detain any sum of the plaintiff's whatever" and "the Court ordered a Rule for trial in eight days"—The same day a case was postponed to get the evidence of Simon Girty, * Isadore Chene† and Captain Caldwell. ‡

*This is the well known Simon Girty, about whom so much has been written, most of it wholly untrue. Born in Pennsylvania in 1741, of an Irish father and English mother, he was in 1756 taken prisoner by the Indians with his mother and brothers. He lived with the Senecas for some three years when he was with the rest of the family delivered up. He took part in the border warfare and when trouble began brewing between the Colonies and the Mother Country, was counted on as well-disposed to the latter. He was for a time Lieutenant in a Virginia Company, but in 1778 finally cast in his lot with the loyalists. With McKee and Elliott who were afterwards to take no small part in Border history, he left Pittsburg, and made his way to Detroit. He became a Lieutenant in the Indian Department (a fact which has escaped Butterfield—History of the Girtys by Consul Willstine Butterfield, Cincinnati, Robert Clarke & Co., 1890—who gives the most accurate account of him, but which is attested by the proceedings of the Land Board of the District of Hesse: see Archives Report, Ontario, 1905, pp. 88, 281). He acted as interpreter but not as leader of the Indians as has been represented. He was present at some scenes of torture but there is no well-authenticated instance of his causing or directing it. He was a hardy, brave and indefatigable border warrior whose name has suffered from his being on the losing side of a civil war. He lived in Detroit and after its surrender in 1796, on the other side of the River, where he received a grant of land. He died there in 1818, about two miles below Amherstburg.

†Isidore Chesne was present with Girty and others at the Council held at Detroit in June, 1778, with the Indians, when a plan of campaign was arranged against the rebellious Americans. He seems to have been of a family of original concessionaires who were in 1734 granted lands near Detroit—and he was an ardent supporter of the British cause. Under the name J. Chisne he was awarded Lot 6, not far from Girty's lot.

‡Captain William Caldwell was by birth an Irishman, but was at the outbreak of the Revolution living in Pennsylvania. He took the loyalist side and made his way to Detroit. There he was given the command of a Company of Rangers who with a number of Indians under Captain Elliott went in 1787 to the help of the Wyandots, who had been threatened by an American force under Col. Crawford. The enemy met at Upper Sandusky, and Crawford was vanquished and his force driven back. Crawford and others were taken prisoners by the Indians and Crawford tortured to death in Girty's presence.

Caldwell was wounded and afterwards falling sick went back to Detroit, invalided. After peace was declared he applied for and obtained a grant of land in Upper Canada—his petition was the first filed with the Land Board of the District of Hesse—his "fenced field" is spoken of more than once as a starting point.

In a memorandum by Patrick McNiff, Deputy Surveyor, dated at Detroit, September 30th, 1791, he is mentioned as having received 800 acres of the 3,000 acres to which he was entitled, and is called a reduced officer on half-pay.

The last case reported at length is on June 16th 1791, James May sued Thomas Fleet for taking away an anchor from his yard at Detroit. But the evidence showed that Mr. Williams, mate of the "Felicity," commanding a party of six men, went to Mr. May's yard, pointed out the anchor to the men and had them remove it to the King's ship-yard—the defendant not being present and having nothing to do with the transaction.

On June 23rd 1791 "the Court met, but being a great holiday, *Fete de Dieu*, adjourned to the 30th inst."

June 30 "Jacob Dicks v. Jno. Cray and wife....a witness.... proved the allegations as set forth in the plaintiff's Declaration—the Defendant's wife acknowledged that she does not know anything of the Plaintiff, and that she was sorry for what she had said, and that she was in a passion at the time and did not know what she said, and acknowledging the plaintiff to be an honest man. In consideration of the Plaintiff's relinquishing his claim to the damages, the defendant to pay the costs—allowed witness 2-6 and Ferriage 1-3." The defendant got off cheap—and with this case of happy ending, I should like to close this sketchy account of Mr. Justice Powell's first Court—but the very last case I cannot omit: 4th August, 1791 "George Lyons v. Porline Benac, Esquire, Mr. Roe for plaintiff informs the Court that on the second day of July last a writ of *fi. fa.* was issued from the Court at the suit of the plaintiff against the goods and chattels, lands and Tenements of the Defendant, addressed to the Sheriff of this District who in consequence granted his warrant to Jos. Elam one of his Deputies, who in execution thereof on the 1st day of August instant was violently assaulted and drove off the Defendant's premises by the defendant in person as appears by the affidavit of the said Jos. Elam filed in Court marked "A" and the return of the sheriff on the said writ; wherefore prays the Court to award a writ of *capias ad satisfaciendum* to issue against the Defendant. Court order that a *capias* do issue accordingly." And it is hoped that the Defendant received his just deserts for having drove the Deputy Sheriff off his premises.

WILLIAM RENWICK RIDDELL.

ÉTUDE

SUR LE

JURY EN DROIT COMPARÉ

(Extrait de la *Revue de l'Institut de Droit Comparé*)

TOME VI, 1913

BRUXELLES

IMPRIMERIE F. VAN BUGGENHOUDT

5 ET 7, RUE DU MARTEAU

1913

ÉTUDE SUR LE JURY EN DROIT COMPARÉ

ÉTUDE

SUR LE

JURY EN DROIT COMPARÉ

(Extrait de la *Revue de l'Institut de Droit Comparé*)

TOME VI 1913

BRUXELLES

IMPRIMERIE F. VAN BUGGENHOUDT

5 ET 7, RUE DU MARTEAU

—
1913

1843

1843

THE HISTORY OF THE

REIGN OF

GEORGE III.

BY

JOHN GAY

ESQ.

1843

ÉTUDE SUR LE JURY EN DROIT COMPARÉ

PAR

GASTON BERGÉ,

Avocat près la Cour d'appel de Bruxelles, Vice-Président de l'Institut
de Droit comparé,

Avec la collaboration des membres de l'Institut ci-après nommés :

- MM. AALL, Hermann-Harris, Avocat à Tjorno (Norvège).
BALDWIN, Siméon, Gouverneur de l'Etat de Connecticut.
CASTRO RAMIREZ, Manuel, Avocat, Ministre des Affaires étrangères du
San Salvador.
DE FREITAS, José-A., Professeur de Droit à l'Université de Montevideo.
SIR DARLING, Charles, Juge à la High Court of Justice de Londres.
DE BUSSCHERE, Alph., Président à la Cour d'appel de Bruxelles.
DIOBOUNIOTIS, Georges, Professeur à la Faculté de Droit à Athènes.
FULD, Conseiller de Justice et Rechtsanwalt à Mayence.
GARAVITO, A., Fernando, Avocat, Rapporteur à la Cour suprême de
Colombie.
HICKS, Henry, Avocat à Minneapolis (Minnesota).
JITTA, Joseph, Professeur à l'Université d'Amsterdam.
CHEV. JOVANOVIĆ, Milan Paul, avocat à Vukovar-sur-Danube.
LIVERMORE, Harris, Avocat à Boston.
MOORE, Harrison, Doyen de la Faculté de Droit de l'Université de Mel-
bourne.
RENAULD, Victor, Avocat à la Cour d'appel de Bruxelles.
RENWICK RIDDEL, William, Conseiller de Justice de la King's Bench
Division à Toronto (Canada).
VELLOSO-REBELLO, A., Premier secrétaire de la Légation du Brésil à
Lisbonne.
-

A. — EXPOSÉ GÉNÉRAL

La section de droit pénal ayant mis à l'étude la question du jury, nous avons fait une enquête préalable sur l'état actuel de la question. Nos membres correspondants nous ont envoyé des rapports, nous avons cru utile de publier les plus intéressants et les plus complets d'entre eux.

C'est d'après ces données que nous avons jugé opportun de donner une vue d'ensemble sur cet objet (1).

L'institution du jury a son origine dans le droit de judicature de l'ancienne jurisprudence romaine. Quand Rome eut commencé à se développer, ses magistrats ne suffirent plus seuls à rendre la justice et durent se faire suppléer par de simples citoyens auxquels ils délèguèrent leur pouvoir en partage ; ce provisoire devint définitif et par la suite de simples citoyens eurent la mission d'assister les magistrats en matière criminelle.

Les juges recevaient trois tablettes, une marquée de la lettre A (*Absolvo*, j'acquitte); l'autre de la lettre C (*Condemno*, je condamne); la troisième des lettres N L, pour *non liquet* (je ne suis pas éclairé sur le débat), ce qui équivalait à un acquittement.

Les juges adjoints au magistrat de carrière devaient se prononcer sans conférer au préalable avec ce dernier, qui présidait l'audience et dont le rôle était d'appliquer la loi en prononçant la peine.

Le Sénat romain jugeait les causes politiques importantes.

Ces institutions démocratiques disparurent avec l'Empire pour céder peu à peu le pas à la juridiction de l'empereur et des juges de carrière désignés par lui.

La même évolution juridique eut lieu chez les peuples barbares qui envahirent l'empire romain ; là aussi, à l'origine, le rôle de l'agent du roi n'était pas de juger, mais de présider et de diriger le tribunal, et là aussi, peu à peu, les délégués du roi finirent pas rendre seuls la justice ; mais la tradition du jury se conserva dans toute sa pureté en Angleterre, où elle a été constitutionnellement consacrée par le *bill of Rights* de 1689.

Dès qu'une mort violente est constatée, la justice in-

(1) Un état très exact des législations européennes a été dressé par MM. NAGELS et MEYERS. *Lois sur le jury*, Bruxelles, Larcier, 1901.

tend à attirer la haine, le mépris ou le ridicule sur une personne, il y a libelle. Quand les injures sont écrites, il y a libelle ; quand les injures sont verbales, il y a injure.

3. Les circonstances atténuantes sont admises et sans influence sur la compétence.

4. Le jury d'accusation est composé de vingt-trois personnes, et sa fonction est de dire s'il y a lieu de poursuivre une personne accusée de crime par l'officier public qui a fait l'instruction. Les audiences devant le jury d'accusation sont toujours *ex parte* et la majorité seulement est requise pour qu'il y ait mise en accusation. La mise en accusation par le jury d'accusation est toujours nécessaire quand il s'agit de procédures devant le jury de jugement dans les cas de crimes. Le jury de jugement est composé de douze personnes et le jury doit statuer à l'unanimité.

5. Les personnes privées ne peuvent poursuivre une cause criminelle, la théorie de notre loi étant que l'Etat seul poursuit les crimes.

6. Les réclamations civiles ne peuvent être jugées par le jury qui statue sur les affaires criminelles.

7. Le jury est désigné par le sort, généralement par les fonctionnaires du gouvernement de la ville ou du comté ou par des commissaires nommés à cet effet.

8. La pénalité pour un crime est déterminée par la législature de l'Etat dans lequel le crime a été commis ou par le congrès des Etats-Unis si les crimes ont été commis contre le gouvernement fédéral.

9. La décision du jury est définitive en cas d'acquiescement. Si les inculpés sont condamnés, un appel peut être déféré à la Cour du dernier ressort, mais devant cette Cour les questions de droit seules peuvent être examinées et on ne peut revenir sur les questions de fait.

II. — Canada.

Rapport sur le jury au Canada.

PAR

WILLIAM RENWICK RIDDELL,

Conseiller de justice

(King's Bench Division) à Toronto (Etat d'Ontario, Canada),

Membre correspondant de l'Institut,

TRADUIT PAR

GASTON BERGE,

Avocat près la Cour d'appel de Bruxelles, vice-président de l'Institut.

1. Le jury est compétent sur toutes les questions de fait en matière criminelle, y compris en matière politique et de presse.

2. Notre loi ne distingue pas les actes criminels en actes politiques et non politiques. Les publicistes sont tenus à des dommages-intérêts dans tous les cas de publications illicites et ils peuvent être mis en accusation criminelle lorsque les publications ont été faites sans justification ni excuse légales et qu'elles tendent à porter atteinte à la réputation d'une personne en l'exposant au mépris ou au ridicule. Il importe peu que le délit ait été commis par caricature ou autrement; il suffit qu'il ait été commis d'une autre manière que par parole.

3. Les circonstances atténuantes sont sans influence sur la compétence, mais dans les affaires criminelles le juge, en déterminant la peine, doit s'en occuper. Dans les affaires civiles, les circonstances atténuantes influent sur le quantum des dommages-intérêts.

4. Il n'existe pas de jury d'accusation en matière civile, le jury de jugement seul décide des questions de fait.

Dans les affaires criminelles, l'accusation doit être considérée comme suffisamment fondée par un jury d'accusation avant d'être déféré au jury de jugement; le jury de jugement statue sur les questions de fait.

5. La Couronne prie toujours les parties lésées de conduire les affaires criminelles bien qu'elles soient poursuivies au nom de la Couronne.

6. Les conséquences civiles d'un fait criminel ne sont pas examinées en même temps que la cause criminelle, mais les mêmes personnes sont compétentes pour siéger dans les jurys civil et criminel statuant à propos du même fait.

7. Douze personnes pour chaque cause composent le jury; elles sont choisies dans les listes électorales par les « prober officers » au nombre de quarante-huit; leurs noms sont placés dans une urne, les urnes sont agitées pour mêler les noms, et le clerc de la Cour tire au sort. L'accusé et l'accusateur jouissent chacun de quatre récusations péremptoires et d'un nombre indéfini de récusations pour cause déterminée.

8. En matière civile, la condamnation est déterminée par le jury; en matière criminelle, par le juge.

9. Un recours contre la sentence peut être présenté à une division de la Cour aux fins de faire reviser la sentence par un nouveau jury; lorsque la décision de la Cour n'est pas satisfaisante, un appel peut être déféré à la Cour d'appel, à la Cour suprême du Canada et au Conseil privé de Sa Majesté, à Westminster.

C. — AMÉRIQUE CENTRALE

I. — République de San Salvador.

Rapport sur l'organisation du jury dans la République de San Salvador

PAR

MANUEL CASTRO RAMIREZ,

Avocat, Ministre des affaires étrangères, Membre correspondant
de l'Institut.

TRADUIT PAR

GASTON BERGÉ,

Avocat près la Cour d'appel de Bruxelles, Vice-Président de l'Institut.

Le 1^{er} août 1832 on a établi le jury pour la première fois dans le San Salvador. La Constitution politique de 1872 déjà lui donnait l'existence dans un de ses articles et, en 1875, par une loi spéciale, on lui a donné une extension très grande.

Depuis lors, l'institution a fait des progrès considérables et aujourd'hui elle est en plein développement et est régie par un chapitre du Code d'instruction criminelle.

Le jury est une institution constitutionnelle. Le jury a à répondre à une série de questions que formule le juge du droit; chacune d'elles se rapporte à un fait à prouver dont la preuve est nécessaire à l'examen du procès. Les questions sont ainsi formulées que le jury doit répondre par oui ou par non; le jury est un tribunal de conscience qui ne résoud pas les questions de droit.

Pour mieux comprendre les explications ultérieures, il paraît utile de parler ici de l'organisation judiciaire en général.

il inscrit immédiatement la réponse du jury en marge du questionnaire sans jamais indiquer le nombre de voix. Il faut au moins sept suffrages affirmatifs pour que la réponse soit affirmative. Six contre six emporte vote négatif, même sur les circonstances atténuantes.

Lorsque toutes les réponses du jury sont, par le chef du jury, inscrites sur le questionnaire, en présence du jury, le chef du jury appose, toujours en présence du jury, sa signature au bas de la dernière réponse; puis le jury rentre dans la salle d'audience où, en présence de la Cour, du ministère public et du greffier, il donne lecture de toute la déclaration du jury, déclaration qui, après avoir été signée par le président de la Cour et par le greffier, est lue à nouveau, cette fois, par le greffier en présence de l'accusé.

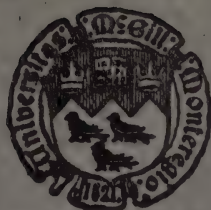
La mission du jury est alors terminée. Si le verdict du jury est un verdict d'acquittement complet pour l'un ou l'autre accusé, l'ordonnance d'acquittement est prononcée immédiatement par le président des assises.

Si le verdict est un verdict de culpabilité, les débats s'ouvrent immédiatement au sujet de l'application de la peine et, le cas échéant, sur les réclamations civiles formulées; puis la Cour délibère et rend son arrêt de condamnation à la peine légale d'après les éléments de fait déclarés constants par le jury et les éléments de droit qu'elle-même a à trancher. Si l'ensemble de la déclaration du jury est tel que les faits, déclarés constants par le jury et rapprochés des éléments de droit décidés par la Cour, ne tombent plus sous l'application de la loi pénale ou bien sont prescrits, la Cour rend un arrêt d'absolution, dans le premier cas, un arrêt déclarant l'action publique éteinte, dans le second cas.

TABLE DES MATIÈRES

de l'Étude sur le jury en Droit Comparé

	Pages.
A. EXPOSÉ GÉNÉRAL ET COMPARATIF (par GASTON BERGÉ).	1
 B. AMÉRIQUE DU NORD :	
I. États-Unis d'Amérique.	16
a) Rapport par HENRY HICKS	16
b) Rapport par SIMÉON BALDWIN	26
c) Rapport par HARRIS LIVERMORE	28
II. Canada (rapport par WILLIAM RENWICK RIDDELL)	30
 C. AMÉRIQUE CENTRALE :	
I. Rép. de San Salvador (rapport par MANUEL CASTRO RAMIREZ).	32
 D. AMÉRIQUE DU SUD :	
I. Brésil (rapport par A. VELLOSO REBELLO)	38
II. Colombie (rapport par FERNANDO GARAVITO, A.)	46
III. Uruguay (rapport par JOSÉ DE FREITAS)	86
 E. OCÉANIE :	
I. Victoria (rapport par W. HARRISON MOORE).	92
 F. EUROPE :	
I. Allemagne (rapport par D ^r FULD)	96
II. Grande-Bretagne (rapport par CHARLES DARLING).	99
III. Grèce (rapport par GEORGES DIQBOUNIOTIS)	101
IV. Hongrie (rapport par MILAN JOVANOVIĆ)	107
V. Norvège (rapport par HERMANN AALL)	108
VI. Pays-Bas (rapport par JOSEPH JITTA)	112
VII. Belgique (rapport par ALPH. DE BUSSCHERE).	113
VIII. France (rapport par ALPH. DE BUSSCHERE)	126



THE UNIVERSITY MAGAZINE

OCTOBER 1913

- I. NATIONALITY AND HOME RULE—RIGHT HON. A. J. BALFOUR
- II. CHANSON DE LA TOUR—MARJORIE L. C. PICKTHALL
- III. THEORY AND PRACTICE—ANDREW MACPHAIL
- IV. LABELS AND LIBERTY—WARWICK CHIPMAN
- V. THE KAISER-JUBILEE—E. W. PATCHETT
- VI. THE PIONEERS OF PICTOU—ALEXANDER LOUIS FRASER
- VII. RACE OR ALLEGIANCE—ARCHIBALD MCGOUN
- VIII. ILLITERACY IN THE WEST—C. B. SISSONS
- IX. THE DIARY OF MRS. SIMCOE—LYNN HETHERINGTON
- X. ESTHER PHELPS—WILLIAM RENWICK RIDDELL
- XI. ANATOLE FRANCE—JULIAN STEELE
- XII. OXFORD UNION SOCIETY—WILLIAM J. ROSE
- XIII. A JOURNEY TO ANCIENT OLYMPIA—MARTHA HALE SHACKFORD
- XIV. HUMAN IMMORTALITY AND ETHICS—J. W. A. HICKSON

Entered according to Act of Parliament of Canada, in the year one thousand
nine hundred and seven, by ANDREW MACPHAIL, in the Office of
the Minister of Agriculture.

THE GAZETTE PRINTING COMPANY LIMITED,
MONTREAL.

we went to Castle Frank. Mrs. Macaulay joined the party. The ice was not quite so good, and the snow melted. It was so mild we could not wear great coats. Francis has a small sleigh, which the servants have taught a goat to draw; he is the handsomest goat I ever saw, and looks very well in harness. It is a very pretty sight to see Francis drawn in this car. They used the animal to draw the sleigh by making him draw it pulling wood. At first he was very untractable.

"On Monday the 8th, we set out on the ice with three carriages brought from Quebec, but driving too near a large crack in the ice near the shore the horses in the first carriage broke in, but being quickly whipped, recovered their footing on the ice and drew the carriage over the crack." In one of his notes Mr. Robertson mentions that "Mrs. Simcoe had brought with her to Canada a spinning wheel which was made by order of Queen Charlotte for the Marchioness of Buckingham, and given by her to Mrs. Simcoe, who, on leaving Canada, gave the wheel to Mr. McGill, of Toronto."

Of the political reasons which determined Governor Simcoe to ask for leave of absence, and the attitude of Lord Dorchester towards him, it is not necessary here to speak. But in July 1796 his request for leave of absence was granted, and Canada knew him no more. But like an old air filled with memories which stir the pulses with past remembrances come these letters from the Old World to remind us of one who lived and made her home amidst the lonely wastes of a great land.

LYNN HETHERINGTON

ESTHER PHELPS

THE Six Nation Indians, including the Mohawks, were, as a rule, faithful allies of King George III during the American Revolution and before. Most of them were accordingly forced to leave their lands in New York and come to Canada after the declaration of peace in 1783.

By direction of the home government, Sir Frederick Haldimand, "Captain General and Commander in Chief of the Province of Quebec and Territories depending thereon, etc., etc.," in October, 1784, did "authorize and permit the Mohawk Nation and such others of the Six Nation Indians as may wish to settle in that quarter, to take possession of and settle upon the banks of the river commonly known as the Ouse or Grand River running into Lake Erie, allotting to them for that purpose six miles deep from each side of the river.....which them and their posterity are to enjoy for ever." The king of course is above grammar—*supra grammaticam*. This is often called a treaty: but it is not a treaty in any accurate sense of the term.

The Mohawks and others went into possession of some of this splendid territory; and there their descendants are still to be found. A Mohawk maiden rejoicing in the name of Esther captured the fancy of a white man, a schoolmaster called Epaphrus Lord Phelps; and he married her. Three children were born to them, who were an object of concern to the tribe, as was their mother. Accordingly, in 1804, the celebrated Captain Joseph Brant, principal chief and agent for the Six Nations, made a lease for 999 years of one thousand acres of land on the Grand River, part of the Indian lands, to Phelps for providing for his wife Esther and her three children. Whence the schoolmaster derived his name, Epaphrus, I cannot tell. It may be but the name of the dear fellow-servant of whom Paul speaks so lovingly

in his letter to the Colossians. He was called Epaphras, but orthography has not always been carefully observed even in proper names. It may, however, be that the perfectly good, if late, Greek adjective, "epaphros," was adopted as a name. Marriage of a white with an Indian woman was not in those days very uncommon; although the more usual union was that of "Indian marriage," such as Sir William Johnston's with Molly Brant, sister of the great war-chief.

Troublous times were in store for the pair. The United States declared war in 1812. We are accustomed to think and talk as if the inhabitants of Canada then were, to a man, enthusiastically loyal: this is far from the truth. No one can read the history of those times, the dispatches, the legislation, without becoming aware that no inconsiderable element of the population was in some instances openly, in more secretly, in favour of the invader. Many were denounced to the authorities and were obliged to flee for their lives; some were imprisoned. The Term Books of the King's Bench are full of cases of suspects being brought before the court on *habeas corpus*; some to be released because there was no real ground of suspicion, some to be remanded that the attorney-general might lay a bill of indictment against them for high treason. In Trinity Term 54, George III, July, 1813, there were twelve persons discharged from custody in one day, Lieut.-Col. Battersby commanding His Majesty's forces at the port of York "having no charge against them."

According to the law, when a man was convicted of high treason, his land went to the king; but a shorter and more certain method was desired with those who had made their escape. In 1814, the legislature of Upper Canada passed an Act (54 George III, cap. 9), which declared that all persons who had become seized of land within the province, and who had withdrawn or should withdraw to the United States without a licence from the governor, should be taken to be aliens born, and incapable of holding lands within the province. The Act further provided that the governor

might appoint commissioners to inquire by the oath of twelve men and make a return to the Court of King's Bench of all such persons as should so withdraw to the United States without a licence, and of their lands; and when the inquisition should be justified, the king should forthwith become the owner of the lands so found. It is to be borne in mind that, at that time, no alien could own land in Upper Canada.

Epaphrus "withdrew" to the United States about June, 1812,—no doubt for very good reasons, as we find an indictment for high treason returned against him at a court held at Ancaster not long after. Ancaster was then, and for some time before, the most important village between York (Toronto) and Newark (Niagara): and, next after these two places and Kingston, was the most important village in Upper Canada. There the courts sat: it had many fine private residences and considerable trade. Its distance from the head of navigation proved its ruin; Hamilton took its place and Ancaster was deserted. Phelps did not stand alone; no less than forty-three others were, at the same time, in the same predicament. The indictment was brought up into the Court of King's Bench by order made in November, 1814, Michaelmas Term 55, George III: next term, January 14, 1815, the names of the indicted were called, and proclamation was made; this was repeated in July, and a writ of *exigent* was issued against each. This had the effect of outlawing any one who did not appear. Phelps did not appear, having, no doubt, a regard for his neck, perfectly justified in his fear; Canadian justice has never been lenient in cases of treason, as the fate of McLane, Von Shoultz and his companions, Lount and Matthews, and the Detroit raiders could certify.

Then came the question of the land of those who were thus disposed of; what land they had must be determined. Abraham Nelles was appointed a commissioner for that purpose, a man of good United Empire Loyalist stock, and of importance in the community, for he had been returning

officer for his county at the election of 1801. He called a jury to meet at the township of Grimsby in January, 1818, to enquire into the case of Phelps. The jury, whose foreman was William Nelles, on January 28th, 1818, found that when Phelps had committed high treason and left the country, June 1st, 1813, and when he became outlawed, he was seized of the unexpired term of the lease for 999 years in the thousand acres we have spoken of. Thereupon the commissioner took possession of the land for the king.

Later on in the same year the legislature, by statute, 59 George III, cap. 12, gave all persons claiming an interest in land forfeited to the Crown the right to make a claim before the commissioners within a limited time: the commissioners were to pass upon the validity of the claim, with an appeal to the Court of King's Bench from their decision.

Besides this, the Act of 1814 had given any one interested in any land declared to be forfeited, one year from the establishment of peace with the United States to traverse the inquisition. Peace was established December, 1814, by the Treaty of Ghent.

Esther had not taken advantage of the right under either statute to dispute the forfeiture of the land; and the time went past for making claim. But she had powerful friends; and in 1821 by statute, 2 George IV, cap. 31, passed April 14th, 1821, she was given six months from the passing of the Act to make her claim. Samuel Hull of Aldborough, was also favoured in the same way by the Act.

Esther made her claim in the Court of King's Bench; and the whole story was there told of her marriage and her babies, the Mohawk Nation, and their land on the Grand River, Brant's deed to her husband, and its purpose, Phelps' treason, and the inquisition by a jury under Commissioner Abraham Nelles. She had the best counsel available, William Warren Baldwin, who, having practised as a medical man in Ireland, came to Upper Canada, and after trying medicine and teaching was called to the bar under special licence from the governor,—a man of acute mind and great legal

learning, who stood at the very head of the bar, having no superiors and very few equals. He was the father of Robert Baldwin, even more celebrated than his father. The Crown was represented by Solicitor-General Boulton, son of the Hon. D'Arcy Boulton, one of the judges of the King's Bench. He was afterwards Chief-Justice of Newfoundland, but returned to Upper Canada and died in that province. He also was subtle and adroit, with a good fund of legal knowledge which he well knew how to utilize to the utmost.

The court was composed of Justices Campbell and Boulton—the Chief-Justice, William Dummer Powell, being absent. Campbell was a Scotsman who became a private soldier in a Highland regiment; taken prisoner at Yorktown, he left the army in 1783, went to Nova Scotia, and studied law. He was called to the bar and became attorney-general of Cape Breton, and was nominated a judge of the King's Bench of Upper Canada in 1811. Becoming chief-justice in 1825, he died in Toronto nine years thereafter. D'Arcy Boulton was an Englishman, and a member of the English bar. He came out in 1797; and after remaining for about ten years in Augusta township he came to York. He also received a special licence and became an active practitioner. He was created solicitor-general in 1805, and being on his way to England was, in 1810, captured by a French privateer. Remaining in a French prison till the short peace of 1814, he in that year came home and was appointed attorney-general. Made a judge in 1818, he resigned in 1825, dying a few years thereafter in Toronto.

Dr. Baldwin argued that the Indians were a distinct though a feudatory people, quoting learnedly from Vattel and other writers, that the treaty made with the Indians was binding, and therefore the woman could not properly be an alien; and as the land had been granted to Phelps in reality in trust for his wife, she should be allowed to hold it. The solicitor-general took the ground, which has ever since been held good law, that the Indians are bound by the common law and have no rights higher than those of other

people. He then pointed out that the Indian woman was on her own showing "a foreigner, and consequently no more entitled to hold lands than a frenchman or any other foreigner." The husband's allegiance fixes that of the wife.

The court held with the solicitor-general, and Esther did not get the land. In the United States there has been from time to time question as to the legal status of Indians and Indian land; in Ontario there never has been any doubt that all the land, Indian or otherwise, is the king's, and that Indians are subjects in the same way as others. There are no troublesome subtleties in Canadian law.

Now that "a frenchman or any other foreigner" is capable of holding land in Ontario, it is possible the decision would be different, but that the Court of King's Bench was right in 1823 in deciding as it did, there can be no doubt.

WILLIAM RENWICK RIDDELL

ANATOLE FRANCE

THE WORKS OF ANATOLE FRANCE, edited by Mr. Frederick Chapman. John Lane: the Bodley Head, London and New York.

ANATOLE FRANCE, who is perhaps the greatest living master of French prose, has for a generation been a unique figure in French letters. He stands absolutely alone. He belongs to no school; nor is his importance in the world of literature specifically due to any single literary form which he has essayed. His novels, for the most part, are not, in the strict sense of the term, fiction; they are polemical indictments of modern life; his essays are personal confessions; his criticism is almost autobiography; while his great historical study of Joan of Arc stays not within the prescribed limits of the historian's art but encroaches upon the domain of lyric poetry. His writings, great and small, serious and fantastic alike, have a quality which is distinctly Anatolian, and makes them, in many respects, a unique contribution to French literature.

Nor is the aloofness of Anatole France alone a matter of form. He is a great ironist; and it is of the very nature of an ironist that he is elusive. In the utterances of M. France there is, therefore, an obvious consciousness of reserve. He is suggestive rather than dialectical. Whatever the subject he treats of, one feels that there is always an unspoken residuum behind the thought expressed, and that in that residuum lies the essence of his convictions. Moreover, his literary career divides itself into two or three periods, differing so much one from the other, that even here elusiveness exists and betrays the casual reader into the belief that the author of "*Le Crime de Sylvestre Bonnard*," of "*Thaïs*," and of "*l'Isle des Pingouins*," is unstable in opinion and contradictory in his ethical idealism. In truth, the task of tabulating the genius of this consummate but evasive artist would seem like picking up that sealed bottle of Arabian fame, remarking to a bystander, "There is a genie

Journal of

the American Institute of

Criminal Law and

Criminology

CONTENTS

EDITORIALS

- Do we need the Legal Muckraker?—Race Improvement—A Proposal for Official Expert Witnesses—Immigration and Crime—The Feeble-Minded Delinquent. 3

CONTRIBUTED ARTICLES

1. Report of the Committee of the Kansas Bar Association on Crimes and Criminal Procedure *William E. Higgins* 12
2. Criminal Procedure in Canada *William Renwick Riddell* 28
3. The Recent Federal Census of Prisoners *Joseph A. Hill* 32
4. The Payment of Prisoners *F. Emory Lyon* 36
5. Where Prisoners are Trusted *W. E. Collett* 43
6. Professor Ferri's Comment on the Seventh International Congress at Cologne *Robert Ferrari* 49
7. Crime and Insanity in the Twenty-First Century *Cesare Lombroso* 57
8. The Chicago Police—Report of the Chicago Civil Service Commission *Messrs. Campbell, Flynn and Lower* 62

JUDICIAL DECISIONS ON CRIMINAL LAW AND PROCEDURE 85

NOTES ON CURRENT AND RECENT EVENTS 93

REVIEWS AND CRITICISMS 138

BIBLIOGRAPHY 156

\$3.00 a Year

60 Cents a Number

Published bi-monthly by

THE AMERICAN INSTITUTE OF CRIMINAL LAW AND CRIMINOLOGY
Northwestern University Building,
31 West Lake Street, Chicago, Illinois.

Entered as second-class matter, November 5, 1910, at Chicago, Ill., under the act of March 3, 1879

American Institute of Criminal Law and Criminology.

OBJECT: The object of the American Institute of Criminal Law and Criminology "shall be to further the scientific study of crime, criminal law and procedure, to formulate and promote measures for solving the problems connected therewith and to co-ordinate the effort of individuals and of organizations interested in the administration of certain and speedy justice."

ORGANIZATION. Membership—The Institute is both a national and a local organization, the national organization being the American Institute and the local organization being known as "_____ State Branch of the American Institute of Criminal Law and Criminology," with such local branches of cities, counties or other districts for local work, meetings and investigations, as the state branch may desire, such local branches to fix their dues and elect their officers subject to the approval of the state branch. Applications for membership in the American Institute itself should be addressed to the secretary, and are passed upon by the Executive Board. Applications for membership in the state branch where the applicant resides should be sent to the secretary of such state branch, or to the secretary of the American Institute who will forward it to the secretary of the state branch.

INFORMATION. All communications with reference to the work of the Institute and membership therein should be addressed to:

Secretary, American Institute of Criminal Law and Criminology, Madison, Wisconsin.

DUES. The annual dues of the American Institute are \$2.00. The annual subscription to the JOURNAL is \$3.00, thus giving all the advantages of the Institute and the JOURNAL for \$5.00 per year. The annual dues of the state branches are such as each state branch may fix. Where a state branch is organized, residents of that state must join through it and membership will include membership in the American Institute.

OFFICERS. The general officers of the Institute and the Executive Board are:

PRESIDENT:

John B. Winslow, Chief Justice of the Supreme Court of the State of Wisconsin, Madison, Wis.

VICE-PRESIDENTS:

Morton Prince, Boston, Mass., former President of the American Neurological Society and the American Psychopathological Society, and Professor of Neurology in Tufts Medical College.

Charles A. De Courcy, Lawrence, Mass., Justice of the Supreme Court.

George W. Kirchwey, New York, N. Y., Professor of Law in Columbia University, Director of the New York Prison Association, and President of the New York Society of the Institute.

James W. Garner, Urbana, Ill., Professor of Political Science in the State University.

Harvey C. Carbaugh, Chicago, Ill., Colonel and Judge Advocate, U. S. Army, Western Division.

TREASURER:

Bronson Winthrop, New York, N. Y., of the New York Bar.

SECRETARY:

Eugene A. Gilmore, Madison, Wis., Professor of Law in the State University.

EXECUTIVE BOARD:

John H. Wigmore, Chicago, Ill., Chairman; Professor of Law in the Northwestern University, and former President of the Institute, ex-officio.

Wm. O. Hart, New Orleans, La., Commissioner on Uniform State Laws.

Wm. E. Higgins, Lawrence, Kan., Professor of Law in the State University.

Wm. A. White, Washington, D. C., Superintendent of the Government Hospital for the Insane.

Wm. E. Mikell, Philadelphia, Pa., Professor of Law in the University of Pennsylvania.

Eugene Smith, New York, N. Y., President of the New York Prison Association.

Frederick B. Crossley, Chicago, Ill., Librarian of the Elbert H. Gary Collection of Criminal Law and Criminology, Northwestern University, and Managing Director of the JOURNAL of the Institute, ex-officio.

Robert H. Gault, Evanston, Ill., Assistant Professor of Psychology in the Northwestern University, and acting Managing Editor of the JOURNAL of the Institute, ex-officio.

Edwin R. Keedy, Chicago, Ill., Professor of Law in the Northwestern University.

Nathan William MacChesney, Chicago, Ill., of the Chicago Bar, Commissioner on Uniform State Laws, Judge-Advocate-General of Illinois, and former President of the Institute, ex-officio.

E. Ray Stevens, Madison, Wis., Judge of the Circuit Court.

Alexander H. Reid, Wausau, Wis., Judge of the Circuit Court.

Neelie B. Neelan, Milwaukee, Wis., Judge of the Municipal Court.

Edward A. Ross, Madison, Wis., Professor of Sociology in the State University.

Ch. S. Seaman, Milwaukee, Wis., Councilor of the American Medical Association, and Regent of the State University.

Henry M. Bates, Ann Arbor, Mich., Dean of the Law School of the State University.

REPORT ON CRIMES AND CRIMINAL PROCEDURE

of the offense depending upon the successive elements eliminated by failure of proof and upon the establishment of those remaining.

Eleventh. In conclusion, your committee states that the elimination of errors and the improvement of the law and procedure is to be obtained only after careful investigation. It therefore recommends that the committee be continued for further work.

CRIMINAL PROCEDURE IN CANADA.¹

WILLIAM RENWICK RIDDELL.

At the conquest of Canada by the British, 1759-60, the English Criminal Law was introduced by the conquerors, although with the exception of a few years, the French-Canadians were permitted to retain their own law in civil matters. The English criminal law continued to prevail except as modified by provincial statutes—and these statutes in general closely followed the legislation in the mother country. This statement also applies to the Provinces of Nova Scotia and New Brunswick. Accordingly, at Confederation in 1867 the criminal law of all the confederating colonies was almost identical—while the civil law of Lower Canada (Quebec) was markedly different from that of Upper Canada (Ontario), Nova Scotia and New Brunswick, the Lower Canadian law being based upon the Custom of Paris and ultimately upon the civil law of Rome; while that of the others was based upon the Common Law of England. Accordingly the British America Act, which created (1867) the Dominion of Canada, gave to the Parliament of the Dominion jurisdiction over the criminal law, including the procedure in criminal matters. The Provinces, however, retained jurisdiction over the constitution of the Courts of Criminal Jurisdiction as well as over property and civil rights.

For some years there were statutes passed from time to time amending the criminal law, and at length Sir John Thompson, who had been himself a judge in Nova Scotia and had become Prime Minister of Canada, brought about a codification of criminal law and procedure. He received valuable assistance from lawyers on both sides of the House and the Criminal Code of 1892 became law. This with a few amendments made from time to time is still in force.

The distinction between felony and misdemeanor has been abolished, and offences which are the subject of indictment are "indictable offences." And offences not the subject of an indictment are called "offences" simply. Certain offences of a minor character are triable before one or two Justices of the Peace as provided by the Code in each case. In such cases there is an appeal from a magistrate's decision ad-

¹A paper prepared for the New York State Bar Association, January, 1912, at their request.

verse to the accused to the County Court Judge both on law and fact; or the conviction may be brought up on certiorari to the High Court on matter of law.

Cases triable before Justices of the Peace, as, for example (583), resisting the execution of certain warrants (584), persuading or assisting an enlisted man to desert (s. 104), challenging to fight a prize fight or (s. 105) fighting one or (s. 106) being present thereat (s. 118), carrying pistols (s. 119), selling pistols or air guns to minors under 16 (s. 122), pointing pistols (s. 374), stealing shrubs of small value (s. 385), injuring Indian graves (s. 431), buying junk from children under 16, etc., etc.

But offences of a higher degree are indictable.

If a crime, say of theft, is charged against anyone, upon information before a Justice of the Peace, a summons or warrant is issued—and the accused brought before the Justice of the Peace. In some cases he is arrested and brought before the Magistrate without summons or warrant; but then an information is drawn up and sworn to. The Justices of the Peace are appointed by the Provincial Government, and are not as a rule lawyers.

Upon appearance before the Justice of the Peace, he proceeds to inquire into the matters charged against the accused; he causes witnesses to be summoned, and hears in presence of the accused all that is adduced. The accused has the fullest right of having Counsel and of cross-examination, as well as producing any witness and having such evidence heard in his behalf as he can procure. All the depositions are taken down in shorthand or otherwise, and if in longhand, signed by the deponent after being read over to him.

After all the evidence for the prosecution is in, the Magistrate may allow argument, or he may *proprio motu* hold that no case has been made out—in which case the accused is discharged—or he may read over aloud all the evidence again (unless the accused expressly dispenses with such reading) and address the accused warning him that he is not obliged to say anything, but that anything he does say will be taken down and may be given in evidence against him at his trial, and asks, "Having heard the evidence, do you wish to say anything in answer to the charge?" Then, if desired by the accused, the defence evidence is called. If at the close of the evidence the Magistrate is of opinion no case is made out, he discharges the prisoner, but the accused may demand that he (the accuser) be bound over to prefer an indictment at the Court at which the accused would have been tried if the Magistrate had committed him. If a case is made out, the accused is committed

for trial with or without bail as seems just, the witnesses being bound over to give evidence.

Police Magistrates, who are generally barristers, are appointed for most cities and towns; these have a rather higher jurisdiction than the ordinary Justice of the Peace, in some cases with the consent of the accused.

The Courts which proceed by indictment are the High Court (Supreme Court of the Province) and the General or Quarter Sessions. Judges of these Courts are appointed by the Crown (i. e., the Administration at Ottawa) for life, and must be barristers of ten years' standing.

The High Court can try any indictable offense; the Sessions cannot try treason and treasonable offences, taking, etc., oaths to commit crime, piracy, corruption of officers, etc., murder, attempts and threats to murder, rape, libel, combinations in restraint of trade, bribery, personation, etc., under the Dominion Elections Act.

Within twenty-four hours of committal to gaol of any person charged with any offence which the Sessions could try, the Sheriff must notify the County Court Judge, who acts as Judge in the Sessions, and with as little delay as possible the accused is brought before the Judge. The Judge reads the depositions and tells the prisoner what he is charged with, and that he has the option of being tried forthwith before him without a jury or being tried by a jury. If the former course is chosen, a simple charge is drawn up, a day fixed for the trial and the case then disposed of.

If a jury be chosen, at the Sessions or the High Court (Assizes), a bill of indictment is laid before a Grand Jury (in Ontario of 13 persons) by a Barrister appointed by the Provincial Government for that purpose. The indictment may be in popular language without technical averment, it may describe the offence in the language of the Statute or in any words sufficient to give the accused notice of the offence with which he is charged. Forms are given in the Statute, which may be followed. Here is a sample:

"The Jurors for Our Lord the King present that John Smith murdered Henry Jones at Toronto on February 13th, A. D. 1912."

No bill can be laid before the Grand Jury by the Crown Counsel (without the leave of the Court) for any offence, except such as are disclosed in the depositions before the Magistrate. But sometimes the Court will allow other indictments to be laid. The Grand Jury has no power to cause any indictments to be drawn up.

Upon a true bill being found, the accused is arraigned; if he pleads

"Not Guilty" the trial proceeds. He has 20 peremptory challenges in capital cases: 12 if for an offence punishable with more than five years' imprisonment, and four in all other cases—the Crown has four, but may cause any number to stand aside until all the jurors have been called. I have never in 30 years' experience seen it take more than half an hour to get a jury even in a murder case—and I have never but once heard a juryman asked a question.

In case of conviction, the prisoner may ask a case upon any question of law to be reserved for the Court of Appeal, or the Judge may do that *proprio motu*. The Court of Appeal may also direct a new trial upon the ground that the verdict is against evidence; but I have never known that to be done.

No conviction can be set aside or new trial ordered, even though some evidence was improperly admitted or rejected or something was done at the trial not according to law, or some misdirection given, unless in the opinion of the Court of Appeal some substantial wrong or miscarriage was thereby occasioned at the trial. If the Court of Appeal is unanimous, against the prisoner, there is no further appeal, but if the Court is divided, a further appeal may be taken to the Supreme Court of Canada. I have never known this to be done.

A wife or husband is a competent witness in all cases for an accused. He or she is compellable as a witness for the prosecution in offences against morality, seduction, neglect of those in one's charge and many others. The accused is also competent, but not compellable in all cases. If an accused does not testify in his own behalf, no comment can be made upon the fact by prosecuting Counsel or the Judge.

No more than five experts are allowed on each side. I have never known a murder case (except one) take four days—most do not take two, even with medical experts.

THE RECENT FEDERAL CENSUS OF PRISONERS.

JOSEPH A. HILL.

A statement recently issued by the Bureau of the Census gives the total number of sentenced prisoners confined in prisons and jails on January 1, 1910, as 113,579; and the number committed to prisons or jails during the calendar year 1910 as 479,763. The Bureau fully recognizes that without further analysis these totals, published in advance of the complete report, possess no value as a measure of criminality, since they include every degree and variety of offense from disorderly conduct to murder in the first degree. But when the returns have been classified by nature of offense, by duration and character of sentence, by sex, age, and nativity of the offender, as they will be in the final report, they will constitute a valuable source of information regarding crime and criminal classes. This will be particularly true of the returns of commitments; for these returns when classified and analyzed will furnish an accurate measure of the crime which was detected and punished during the year 1910 exclusive of those minor offenses which are punished by fines without imprisonment.

This is the second time that the Bureau of the Census has compiled complete statistics relative to the prisoners committed during one year, the first compilation of this sort being that made in connection with the prison census of 1904. Prior to that census, federal prison statistics related almost exclusively to the prison population, or the number of prisoners present on a given day. Statistics of prison population are, however, of little value as an indication of the criminality of any community, because they afford no measure of the number of crimes or offenses punished within any fixed period of time. They are, moreover, misleading as regards the relative number of serious and petty offenses, since owing to the accumulation of long term prisoners, committed for serious offenses during an indefinite period prior to the date of the census, the proportion of serious offenders in the prison population necessarily greatly exceeds the proportion of such offenders in the total number of those sentenced during any given period. For instance, as regards a crime punished by five years' imprisonment, the enumeration of prisoners on a given day includes the accumulation of commitments for the previous five years, but as regards an offense punished by ten days' imprisonment, the prison population includes only the accumulation of the preceding ten days.

It is the statistics of prison population to which Professor Robinson refers in his review of federal criminal statistics when he says: "These

Journal of

the American Institute of

Criminal Law and

Criminology

CONTENTS

EDITORIALS—

- The Benevolent Colony of Georgia—Heredity and Responsibility—
The Method of Treating the Criminal Insane in Germany—Is
This Plan for Abbreviating New Trials Feasible?—Indications
of a Progressive Spirit Among the Police..... 1

CONTRIBUTED ARTICLES—

1. Scandalum Magnatum in Upper Canada..... William Renwick Riddell 12
2. Is It Lawful to Bring a Man Back to Pennsylvania by Extradition
on the Charge of Desertion Under the Act of 1903, To Proceed
Against Him Under the Act of 1867?..... William H. Baldwin 20
3. The Bases of Divorce..... John Lisle 30
4. A Study of One Hundred Juvenile-Adult Offenders in the Cook
County Jail, Chicago, Illinois..... A. P. Drucker 47
5. The Association Method in Criminal Procedure..... Paul Menzerath 58
6. Insanity and Criminal Responsibility (Report of Committee B of
the Institute, concluded)..... Edwin R. Keedy 67
7. Mental Types of Juvenile Delinquents Considered in Relation to
Treatment..... Clara Harrison Town 83

JUDICIAL DECISIONS ON CRIMINAL LAW AND PROCEDURE 90

NOTES ON CURRENT AND RECENT EVENTS..... 100

REVIEWS AND CRITICISMS..... 135

BIBLIOGRAPHY OF PERIODICAL LITERATURE..... 155

\$3.00 a Year

60 Cents a Number

Published bi-monthly for
THE AMERICAN INSTITUTE OF CRIMINAL LAW AND CRIMINOLOGY
By Northwestern University Law Publishing Association
Northwestern University Building
31 West Lake Street, Chicago, Illinois

Entered as second-class matter, November 5, 1910, at Chicago, Illinois, under the act of March 2, 1879

American Institute of Criminal Law and Criminology

OBJECT: The object of the American Institute of Criminal Law and Criminology "shall be to further the scientific study of crime, criminal law and procedure, to formulate and promote measures for solving the problems connected therewith and to co-ordinate the effort of individuals and of organizations interested in the administration of certain and speedy justice."

ORGANIZATION. Membership—The Institute is both a national and a local organization, the national organization being the American Institute and the local organization being known as "_____ State Branch of the American Institute of Criminal Law and Criminology," with such local branches of cities, counties, or other districts for local work, meetings and investigations as the state branch may desire, such local branches to fix their dues and elect their officers subject to the approval of the state branch. Applications for membership in the American Institute itself should be addressed to the secretary, and are passed upon by the Executive Board. Applications for membership in the state branch where the applicant resides should be sent to the secretary of such state branch, or to the secretary of the American Institute, who will forward it to the secretary of the state branch.

INFORMATION. All communications with reference to the work of the Institute and membership therein should be addressed to:

Secretary, American Institute of Criminal Law and Criminology, Madison, Wisconsin.

DUES. The annual dues of the American Institute are \$2.00. The annual subscription to the JOURNAL is \$3.00, thus giving all the advantages of the Institute and the JOURNAL for \$5.00 per year. The annual dues of the state branches are such as each state branch may fix. Where a state branch is organized, residents of that state must join through it and membership will include membership in the American Institute.

OFFICERS. The general officers of the Institute and Executive Board are:

PRESIDENT:

Orrin N. Carter, Justice of the Supreme Court of Illinois, Court House, Chicago, Ill.

VICE PRESIDENTS:

Charles A. DeCourcy, Justice of the Supreme Judicial Court of Massachusetts, Boston, Mass.

Charles R. Henderson, Professor of Sociology, University of Chicago, Chicago, Illinois.

Robert W. McClaghry, Warden of the Federal Penitentiary, Fort Leavenworth, Kansas.

Frank L. Randall, Supt. of the State Reformatory, St. Cloud, Minn.

Jane Addams, Head of Hull House, Chicago.

TREASURER:

Bronson Winthrop, 32 Liberty St., New York, N. Y., of the New York Bar.

SECRETARY:

Eugene A. Gilmore, Madison, Wis., Professor of Law in the State University.

EXECUTIVE BOARD:

For the term expiring 1913:

W. O. Hart, Commissioner on Uniform State Laws, 134 Carondelet St., New Orleans, La.

Wm. E. Higgins, Professor of Pleading and Practice, State University, Lawrence, Kansas.

Edward A. Ross, Professor of Sociology, State University, Madison, Wisconsin.

Wm. A. White, Supt. of the Government Hospital for the Insane, Washington, D. C.

For the term expiring 1914:

Henry M. Bates, Dean of the School of Law, State University, Ann Arbor, Michigan.

Wm. E. Mikkell, Professor of Law in the University of Pennsylvania, Philadelphia, Pa.

A. H. Reid, Judge of the Circuit Court, Wausau, Wisconsin.

E. Ray Stevens, Judge of the Circuit Court, Madison, Wisconsin.

For the term expiring 1915:

Edwin M. Abbott, of the Philadelphia Bar, 819 Land Title Bldg., Philadelphia, Pa.

Wm. N. Gemmill, Judge of the Municipal Court, Chicago, Ill.

George W. Kirchwey, Professor of Law, Columbia University, New York City.

Edward J. McDermott, of the Kentucky Bar, Lieutenant Governor of Kentucky, Louisville, Ky.

Ex-Officio:

John H. Wigmore, Professor of Law in Northwestern University, 31 W. Lake St., Chicago, Ill.

Nathan William MacChesney, of the Chicago Bar; Commissioner on Uniform State Laws, 30 N.

LaSalle St., Chicago, Illinois.

John B. Winslow, Chief Justice of the Supreme Court of Wisconsin, Madison, Wisconsin.

Frederic B. Crossley, Managing Director of the Journal of the Institute, Librarian of the Elbert

H. Gary Collection of Criminal Law and Criminology, Northwestern University, 31 W. Lake St., Chicago, Illinois.

Robert H. Gault, Managing Editor of the Journal of the Institute, Assistant Professor of Psychology in Northwestern University, Evanston, Illinois.

PROGRESSIVE SPIRIT AMONG THE POLICE

out what one might achieve, and in the other what becomes of those who are disinclined.

The spirit of progress and betterment manifested by the police heads, the efforts made to place themselves and their institutions in the esteem and confidence of the public by illustrating their mode of conduct and accomplishments, at personal expense, was an ambition and work deserving applause by the public. When it is considered that they must encounter the gross charges heaped upon a municipal government, often unjustly; when it is remembered that "they are condemned if they do and condemned if they don't;" when it is realized that they are but human, laboring under constant temptations and are continually exposed to many of the ills and risks that prevail, *the good citizen should be sympathetic with them. He should do more. He should co-operate with them to the end that the police establishment may be exempt from political influence; that officers may be retained in the service during faithful performance of duty; that they may be sufficiently paid for what they do and for the exposure they undergo.* It should not be considered a humiliation to encourage the police. Their very work makes them unpopular, but that would not be the case if the citizens would sustain them, excepting in as far as non-enforcement of the laws and obedience to the regulations are concerned. They will be good men, and efficient officials in proportion to the confidence and backing received at the hands of the respectable element of the population. Pride and ambition can be instilled in the police organization only by a recognition of their laudable work. Merit should be recognized; if not, discouragement and indifference follow.

I venture the assertion that if those interested in a high class of government would stand by the police, meet them half way, and lend them support by appropriate manifestation from time to time, forces would advance to a higher standard. Too much should not be expected by sympathetic persons; suspicion should be cast aside, and theories should not be allowed to prevail against practical experience.

I hope for a closer relationship between those who have the time, education, and means to study, and the police, who as a rule do not get or have not had the best advantages, but who are willing to accept advice from such sources when it is presented in the proper spirit. Among the salutary results of such relationship will ultimately be the complete separation of the entire police force from political influence and the payment of increased salaries. When these ends shall have been attained there will be a check upon police graft.

RICHARD A. SYLVESTER.

SCANDALUM MAGNATUM IN UPPER CANADA

THE HONOURABLE WILLIAM RENWICK RIDDELL, L. H. D., J. U. D., &c.^½

The Statute of Westminster the *First*, 3, *Edw. I*, passed in 1275, provided by *cap. 34* as follows:

“Forasmuch as there have been oftentimes found in the Country Divisors [devisers] of Tales, whereby Discord, or Occasion of Discord, hath many times arisen between the King and his People, or the great Men of this Realm; For the damage that hath and may thereof ensue, it is commanded That from henceforth none be so hardy to tell or publish any false News or Tales, whereby Discord, or Occasion of Discord or Slander may grow between the King and his People or the great Men of the Realm; and he that doth so, shall be taken and kept in Prison until he hath brought him into the Court, which was the first Author of the Tale.”

I use the translation given in the Statutes at Large; but in the print of the original, the reading is open “celuy dount le poeple [sic] serra move”—the editor reads “la parole” instead of “le people”—the real reading then would be “him by whom the people shall be stirred up.”¹

This provision for imprisonment is no doubt the origin of the “fireside law” which asserts with confidence that a slanderer may be compelled to disclose his authority.

This statute was much extended more than a century afterwards in 1378, by the statute of Gloucester, 2 *Richard II*, *St. 1*, *cap. 5*, which provided “that from henceforth none be so hardy to devise, speak or to tell any false News, Lyes, or other such false Things, of Prelates, Lords, and of other aforesaid, whereof Discord or any Slander might rise within the same Realm: and he that doth the same shall incur and have the Pain another Time ordained thereof by the Statute of Westminster the First which will that he be taken and imprisoned till he

^½ Puisne Justice, King's Bench Division, High Court of Justice, Ontario, since 1906. Victoria University. (Mathematical and Nat. Science Prizeman), B. Sc. LL.B. Called to the Bar, with honors and Gold Medal, in 1883; practiced at Cobourg, 1883-1892, and in Toronto, 1892-1906. He has been General Counsel for the Wabash R. R. Co., and Special Counsel for the city of Toronto in civic investigations, etc. Former member of the Senate and Board of Regents, of Victoria University. Since 1894 he has been a member of the Senate of the University of Toronto, and for several years examiner in Roman Constitutional and International Law.

¹ But see the interpretation in 2 *Ric. II*, *St. 1*, *cap. 5 ad fin.*

SCANDALUM MAGNATUM IN UPPER CANADA

have found him of whom the Word was moved" (celluy dont la parole serra muevez). The "other aforesaid" in this enactment are (in addition to "Prelates, Dukes, Earls, Barons,") "other Nobles and Great Men of the Realm, and also * * * the Chancellor, Treasurer, Clerk of the Privy Seal Steward of the King's House, Justices of the one Bench or the other and * * * other Great Officers of the Realm."

Ten years afterwards, in 1388, the Statute passed at Cambridge, *12 Richard II, cap. 11*, provided that in case of any person violating either of these Statutes, "when any such is taken and imprisoned, and cannot find him by which the Speech be moved (celluy dont la parole serra muevez) as before is said, that he be punished by the advice of the Council, notwithstanding the said Statutes."

In 1554, the Statute *1 & 2 Ph. & M. by cap. 3* confirmed the first two Statutes and gave Justices of the Peace authority to hear and determine offenses against them. It further provided that "if any Person be convicted or attainted for speaking maliciously of his own Imagination any false seditious and slanderous News, Saying, or Tales of the King or Queen, then he shall for his first Offense be set on the Pillory in some Market-Place near where the Words were spoken and have both his Ears cut off unless he pay to the Queen an hundred Pound within one Month after Judgment given and also shall be three Months imprisoned; and if he shall speak any such slanderous and seditious News or Tales of the Speaking or Report of any other, then he shall be set on the Pillory and have one of his Ears cut off unless he pay an hundred Marks to the Queen's Use within one Month after, and shall be one Month imprisoned; and if he shall do it by Book, Rhime, Ballad, Letter or Writing, he shall have his right Hand stricken off. And if any Person being once convicted of any of the Offenses aforesaid, do afterward offend, he shall be imprisoned during his Life, and forfeit all his Goods and Chattels." This drastic Statute was revived in 1557 by *4 & 5 Ph. & M., cap. 9*, to continue till the end of the next Parliament. In 1558, on the accession of Queen Elizabeth, by Statute, *1 Eliz. cap. 6* "The Penalty mentioned in the Statute of *1 & 2 Ph. & M., cap. 3*, for speaking false slanderous News of the King or Queen, or for committing any of the Offences expressed in the said Act shall be expounded to extend to the Queen that now is, and to the Heirs of her Body."

These Tudor enactments of course came to an end at the death of Queen Elizabeth; but the Plantagenet Statutes continued in force, (at least nominally and in form) in England until repealed by the "Statute Law Revision Act, 1887," with other enactments specially

mentioned "which may be regarded as spent * * * or have by lapse of time or otherwise become unnecessary."

The proceedings under these earlier statutes when they were in force were by writ of *Scandalum Magnatum*, which was both criminal and civil.

There are many cases reported in which this proceeding was adopted rather than a simple action for Slander. For example, in Pasch., 26 Eliz. in the K. B., a case is reported by Leonard (1 Leon. 287) "One was convicted in the County of Lincoln upon the Statutes of West. 1, cap. 33 and 2 R. 2 cap. 5 of News, and the words were That Campian was not executed for treason but for Religion and that he was as honest a man as Cranmer—the Bill was endorsed *Billa Vera* but whether *ista verba prolata fuerunt malitiose, seditiose* or *e contr. ignoramus*. The same Indictment being removed into the King's Bench, the party for the causes aforesaid was discharged." "Campian" was of course Campion, the well-known Jesuit, who had been executed by Elizabeth; that his execution was for religion and that he was as honest a man as Cranmer few will now dispute, but he who said so in 1583 escaped punishment only because the jury could not be sure whether he said so *malitiose et seditiose*.

In the case of an attack upon the character of any of the Ministers of the Crown, it was usual to punish offenders in the Star Chamber; but an action founded upon the Statutes was not infrequently resorted to in former times. The curious may look at the following: Buller N. P. 4; 4 Co. 13; 12 Co. 133; 10 Co. 75; Cro. Car. 136; Vent. 60; Lord Townsend v. Dr. Hughes, 2 Mod. 150; Wilmot's Notes 255; Cro. Jac. 196, Earl of Lincoln case; 3 Leon. 376 Cro. Eliz. 1, 67; 1 Sid. 293. The editions of Starkie on Slander and Libel before the 4th, contain a whole chapter on the subject.

Outside of the case in 1 Leon. 287, I know of only one English case in which a judge is said to have availed himself of the "Statutes of News." In 12 Co. R., p. 134 we find that "in 3 Edw. 2 in the Exchequer, Henry Bray spoke of John Foxley, Baron of the Exchequer; it was resolved that the judgment in an indictment upon the said Statutes, * * * also the party grieved may have an action *de scandalo Magnatum* and recover his damages." The "said Statutes" are 5 R. 2, cap. 6 and 17 R. 2, cap. 8 concerning rumours; and I cannot understand why and how a Statute of Richard II could be resorted to in the reign of his great-grand-father.

The only Baron of the Exchequer who could be referred to was John de Foxle constituted Baron of the Exchequer in 3 Edw. II, February 28, 1309; and he died in 18 Edw. II, 1324, fifty-three years

before Richard II came to the throne.² The Statute of Westminster the First might be of some avail—that prohibited false tales whereby discord might arise between the King and the great men of the Realm but it did not in terms give an action (cf. the argument of Serj't Maynard in 2 *Mod.*, p. 152); or the Common Law, as it is supposed that these Statutes are simply in affirmance of the Common Law.

The action became obsolete in England. Odgers in the 5th edition of his work on Libel and Slander (1911) says, p. 74, that no instance of its use is to be found later than 1710. The action never made its way into the North American Colonies or the United States.

Sillars v. Collier (1890) 151 *Mass.* 50; *Hogg v. Dorrah* (1835) 2 *Porter (Ala.)* 212 in which a member of the Legislature was called a "corrupt old Tory," and his Counsel expressly disclaimed the principles of the law of *Scandalum Magnatum*.

Reeves v. Winn (1887) 97 *N. Car.* 246, in which Davis, J., delivering the judgment of the Court, said "in this day and country there is no such thing as *Scandalum Magnatum*."

Sharff v. Commonwealth (1810) 2 *Binney Pa.*, 514 at p. 519, may be glanced at also.

In *State ex inf. Crow, Atty. Genl., v. Shepperd*, in the Supreme Court of Missouri (1903) 76 *S. W. Rep.* 79 at p. 83, Marshall, J., in delivering the judgment of the Court, says: "The offence of *Scandalum Magnatum* has not existed in this country since the Revolution;" but he gives no instance of its existence in America before the Revolution.

There is no trace of the doctrine in Nova Scotia or New Brunswick, the Provinces which with Upper Canada and Lower Canada formed the Dominion of Canada as first constituted in 1867. Lower Canada had been under the civil law of England only for a period of a few years ending in 1774, and thereafter the French (Canadian) law was that prevailing in civil matters. Nova Scotia and New Brunswick were, however, Common Law Countries. So were Prince Edward Island and British Columbia; and the action was unknown also in these Provinces, which joined the Dominion later than 1867. The newer Provinces—Manitoba, Alberta and Saskatchewan—and the Yukon Territory, derive most of their jurisprudence from the Province of Ontario. The action has never been attempted in any of these divisions of the Dominion.

Upper Canada by the first Act of the first session of its first parliament, in 1792, 32 *George III*, cap. 1, s. 3, enacted "that from and after the passing of this Act, in all matters of controversy relative

² Foss, Judges of England, vol. 3, p. 254; do., Biog. Dict., Judges of England, p. 280.

to property and civil rights, resort shall be had to the laws of England, as the rule for the decision of the same," the Poor Law and Bankruptcy Law being excluded.

I find in this Province one and only one attempt to bring into force the action of *Scandalum Magnatum*.

Robert Thorpe was an Irish Barrister who in 1802 received an appointment as Judge of the Supreme Court of Prince Edward Island; in January, 1805, he was appointed to a puisne Judgeship in the Court of King's Bench, Upper Canada.

The Government of the Colony was at that time somewhat autocratic, and not long after his arrival, Mr. Justice Thorpe took sides with the Radical element which desired a democratic administration of public affairs—in fact, like many of his countrymen, he went "agin' the gover'ment." He was even elected to the Commons House of Assembly as a Radical member. Whether Thorpe was honest in the stand he took in Upper Canada may be doubted. In March, 1806, he complained to Lord Castlereagh of the weak government which had made the Assembly strong. Writing to Cooke the same month when Allcock was promoted from the Chief Justiceship of Upper Canada to that of Lower Canada, he hopes that the Home Government will not disgrace him by sending anyone over him, and urges that a Court of Chancery be erected and (impliedly) that he be made the Judge of that Court as well as Chief Justice of the King's Bench. When he hears in July, 1806, that Scott, the Attorney-General, was to be appointed Chief Justice, he cannot contain his wrath; he writes, "He is perfectly unequal to the situation * * * the Province will be universally dissatisfied with him, but * * * would have been perfectly satisfied had I been appointed." In October, 1806, writing to Sir George Shee, he says, "A being has been put over my head who has neither talent, learning, nerve nor manner; and also from being despicable in the mind of the people, can have no weight with juries, and consequently will reduce the Bench to insignificance." Of his brother Judge Powell he was jealous also—he says, "Mr. Justice Powell is not a good lawyer and I have great reason to believe he is not a good subject." It is hard to resist the conclusion that much, if not all, of Thorpe's Radicalism was due to spite and disappointment.

He took the Western Circuit in the fall of 1806, and in October, at the Assizes for the London District at Charlotteville, he began his charge to the Grand Jury thus: "The fifteen years disgraceful administration of this Government calls loudly for your interference;" and he proceeded in like strain. The Grand Jury in their presentment followed the Judge's lead and hoped that "such a change of measures will

take place as may tend to bury in oblivion the remembrance of proceedings heretofore sanctioned by authority and yet no less derogatory to the prerogative of the Crown than invasive of the privileges of the subject." In his reply, Thorpe expressed a very low opinion of the government and said, "When there was neither talent, education, information or even manner in the administration, little could be expected and nothing was produced; but there is an ultimate point of depression as well as exaltation, from whence all human affairs naturally advance or recede. Therefore," he continued, "proportionate to your depression we may expect your progress in prosperity will advance with accelerated velocity." Such language as this could not be expected to please the powers that were, or their supporters; and it was no great wonder that Col. Joseph Ryerson,³ a sound Tory of the old school, should say, as he did openly, that "such conduct was more like that of a United Irishman than a Judge." This was said of Thorpe in his capacity of a Justice of the King's Bench, and he came within the Statute of Richard II, "Justices of the one Bench or the other," if that Statute could be held to cover Colonial Judges.

He took *qui tam* proceedings by *Scandalum Magnatum* against Ryerson. It is probable that it was not so much to punish Ryerson that these proceedings were taken as to prevent the repetition of charges openly made that the Judge procured such addresses to be made by Grand Juries, so that he might be enabled to pose as the great champion of the rights of the people. The charge was frequently made and repeated, that the presentments were drawn up by Thorpe and his friend Weekes, an Attorney who had been a United Irishman, afterwards a pupil in New York of Aaron Burr, and who became a member of the Bar of Upper Canada. Weeks was killed next year in a duel which he had forced on a brother Barrister.

I extract the following from the Term Book of the King's Bench still in the King's Bench Vaults, at Osgoode Hall, Toronto.

In Trinity Term, 47 *George III*, July 8th, 1807, in the Court of King's Bench (praes. Scott, C. J., and Thorpe, J.) p. 107, in the case of *Robert Thorpe v. Joseph Ryerson*, "Time to plead given for one week. On motion of Mr. Sol'r Genl. for Defendant." (The Solicitor

³ Joseph Ryerson was a United Empire Loyalist and fought in the Revolutionary War as a Cadet and Ensign. He came to Upper Canada in 1799 and settled in Charlotteville, becoming a Colonel of Militia. In 1800 he was made a Justice of the Peace and became Chairman of the Quarter Sessions. He was also, in 1800, appointed High Sheriff for the London District, which office he held for about five years. He, with three of his sons, fought through the War of 1812-1815; he survived till 1854, dying at the age of 93.

Charlotteville was Turkey Point on Lake Erie, now no longer even a village, but from 1801 till 1815 the place of meeting of Assizes and Quarter Sessions of the London District.

General was D'Arcy Boulton, afterwards Attorney-General and Puisne Justice of the King's Bench). On July 17th, the same Judges being present, p. 119, "It is ordered that the argument be gone into *instantly* with the consent of the parties and their counsel." No judgment was given.

In the following term, Michaelmas Term, 48 *George III*, November, 1807, Mr. Justice Powell had returned from his trip to Spain, successful in procuring the release of his son from a Spanish-American prison at Omoa; Mr. Justice Thorpe was not present, he having been suspended from his office in October by the Lieutenant-Governor Gore, upon direction of Lord Castlereagh in a dispatch dated June 19th, 1807. Accordingly the Court in Term consisted of Scott, C. J., and Powell, J.

On November 4th, 1807, the third day of Term, p. 23, the case was ordered "to be argued on Friday next." Friday, Nov. 6th, p. 126, it was argued but no judgment given. Monday, Nov. 9th, p. 132, it was ordered "to stand over for a second argument to the first day of Hilary Term next." On that day, Monday, January 4th, 1808, it was "ordered to stand over till Friday;" on Friday, January 8th, p. 149, it was "ordered to stand over;" on Monday, January 11th, p. 150, it was "ordered to stand for second argument on Wednesday next;" on that day, Wednesday, January 13th, p. 153, "the Court will give judgment on Friday next." Friday, January 15th, 1808, p. 154, "Judgment for defendant on Demurrer." Scott, C. J., and Powell, J., constituted the Court during this Term also, Thorpe having been suspended and his place not having been filled.

It looks odd that Thorpe appears to have sat as Judge in his own case; the fact was that though the Court of King's Bench by Statute consisted of the Chief Justice of the Province and two puisne Justices, the Court in Term (Banc) often consisted of only two Judges and not infrequently of only one—a practice held, twenty years later, by the Judicial Committee of the Privy Council in Mr. Justice Willis' case, to be unexceptionable. Of course, Thorpe would not take any part in the decision, if one were to be given: as a fact he did not sit, nor was he present in Court on the final argument.

The Solicitor-General, Counsel for the Defendant, filed a General Demurrer, and his whole contention was that Thorpe being a Colonial Judge was not within the purview of the old Statutes, which were enacted at a time when there were no Colonies or Colonial officers. The Court gave effect to this contention.

The experiment has never been repeated. Whenever any officer of the Government was attacked, a convenient and certain method was

adopted of filing an information for libel—more than one editor was laid by the heels in this way, and at least one ordered to stand in the pillory as well. Still, as late as the early '80s, when I was a student-at-law, our text-book on the Common Law represented the action as in existence.

Mr. Justice Thorpe, returning to England, was appointed Chief Justice of Sierra Leone; after a residence there for some years he brought from that Colony to London a budget of complaints from the people there. He was cashiered for this, and he passed the rest of his life in obscurity and neglect, dying a poor man.

It was not the mere bringing of complaints to London which proved fatal to Thorpe. He made a most vigorous, if not virulent, attack in print against the African Institution and its predecessor, the Sierra Leone Company, organized for the benefit of free blacks on the west coast of Africa. Neither Director nor Manager escaped the lash of his pen. Wilberforce was by implication charged with hypocrisy, Zachary Macaulay (father of Lord Macaulay) with making money out of the pretended charity, and all implored to let the unfortunate blacks alone. Perhaps his worst offense was making public that while a poor old black settler, Kizil, could not get his pay for work and labor done long before for the Company, Macaulay (then lately Secretary and always Director) received fifty guineas for importing ten tons of rice into England from the West Coast of Africa; and while £14.5.4 was spent "for clothing African boys at school," £107.12.0 went "for a piece of plate to Mr. Macaulay." Thorpe was unwise enough to expose the seamy side of charitable institutions; and when we consider that H. R. H., the Duke of Gloucester, was president, Lords Lansdowne, Selkirk, Grenville, Calthorpe, Gambier and Teignmouth were vice-presidents, members of parliament like Wilberforce, Babington, Horner, Stephen, Wilbraham, etc., were members of the Institution, and that Wilberforce was a bosom friend of Pitt's, we need not wonder at Thorpe's dismissal—Don Quixote had quite as good a chance with the windmills. Nevertheless it must be said that his charges in some respects are very like those made a short time before by Dr. and Mrs. Falconbridge.

Thorpe's pamphlet went through at least three editions: my own copy (of the third edition) is dated 1815.

Perhaps one moral of this story is that judges should keep out of politics.

IS IT LAWFUL TO BRING A MAN BACK TO PENNSYLVANIA
BY EXTRADITION ON THE CHARGE OF DESERTION
UNDER THE ACT OF MARCH 13, 1903, FOR THE PURPOSE
OF PROCEEDING AGAINST HIM UNDER THE ACT OF
APRIL 13, 1867?

WILLIAM H. BALDWIN.¹

The act of 1867 was in addition to the remedies then provided by the poor law of 1836, which it resembles. (*Demott v. Com.*, 64 Pa. 302, 1870; *Com. v. Teel*, 30 Pa. C. C. 566, 1905). The procedure in each was practically the same, but under the act of 1867 it was not necessary that the wife or children should be in destitute circumstances, and either of them or any other person could make the complaint, whereas under the poor law the complaint could be made only by the overseers or directors of the poor.

The defendant was not charged with any crime under either law, but on complaint before a magistrate could be arrested and bound over with surety to the next court of quarter sessions to answer the charge of desertion.

Upon such appearance the court of quarter sessions had power to order the defendant to pay such sum as the court thought desirable and proper for the comfortable support and maintenance of his wife and children, and to commit him to the county prison, there to remain until he comply with the order or give security for such compliance.

An amendment to the act passed two years later provides for the release of the defendant at the end of three months if he is unable to comply with the order or give security, and though this has been the practice there is no limit to the duration of the imprisonment if the court is of the opinion that the accused can pay, or can in some way obtain security for the payments ordered. (*Com. v. James*, 142 Pa. 32, 1891; *Com. v. Baldwin*, 149 Pa. 305, 1892).

A further amendment in 1907 removed the limit of \$100 a month to the sum ordered to be paid as fixed by the original act, so that the amount of payment as well as the time limited only by the judgment of the court; though the act of June 15, 1911, which provides that where an order for support is not complied with for thirty days, the

¹After graduating at Western Reserve College, Mr. Baldwin was engaged in business for many years until 1901. Since then he has devoted himself to social work. He published, several years ago, a careful study of the "Family Desertion and Non-Support Laws" of all the states, and has written numerous articles on that subject, including one in this Journal, Vol. III, No. 3, based on the first annual report of the Court of Domestic Relations in Chicago.

Journal of

the American Institute of

Criminal Law and

Criminology

CONTENTS

EDITORIALS

- Extradition of the Insane—Common Sense Relation of Police and Offender—The Laboratory in the Criminal Court..... 161

CONTRIBUTED ARTICLES

1. The Criminal: Who Is He, and What Shall We Do with Him? William N. Gemmill 170
2. A Half Told Tale of Seven Hundred Years Ago..... William Renwick Riddell 193
3. A Brief Review of Criminal Cases in the Supreme Court of Illinois for the Past Year..... Harry A. Bigelow 199
4. Charles Goring's "The English Convict": A Symposium.
 - I. The Results of an Official Investigation in England..... Gina Lombroso-Ferrero 207
 - II. The Present Movement in Criminal Anthropology..... Enrico Ferri 224
 - III. An Investigation of English Convicts and Criminal Anthropology Sante De Sanctis 228
5. Development of the Systems of Control of Convict Labor in the United States..... E. T. Hiller 241

JUDICIAL DECISIONS ON CRIMINAL LAW AND PROCEDURE 270

NOTES ON CURRENT AND RECENT EVENTS..... 280

REVIEWS AND CRITICISMS 304

\$3.00 a Year, Foreign \$3.50.

60 Cents a Number

Published bi-monthly for
 THE AMERICAN INSTITUTE OF CRIMINAL LAW AND CRIMINOLOGY
 By Northwestern University Law Publishing Association
 Northwestern University Building
 31 West Lake Street, Chicago, Illinois
 Entered as second-class matter, November 5, 1910, at Chicago, Illinois,
 under the act of March 3, 1879

American Institute of Criminal Law and Criminology

OBJECT: The object of the American Institute of Criminal Law and Criminology "shall be to further the scientific study of crime, criminal law and procedure, to formulate and promote measures for solving the problems connected therewith and co-ordinate the effort of individuals and of organizations interested in the administration of certain speedy justice."

ORGANIZATION. Membership.—The Institute is both a national and a local organization, the national organization being the American Institute and the local organization being known as "State Branch of the American Institute of Criminal Law and Criminology," with such local branches of cities, counties, or other districts for local work, meetings and investigations as the state branch may desire, such local branches to fix their dues and elect their officers subject to the approval of the state branch. Applications for membership in the American Institute itself should be addressed to the secretary, and are passed upon by the Executive Board. Applications for membership in the state branch where the applicant resides should be sent to the secretary of such state branch, or to the secretary of the American Institute, who will forward it to the secretary of the state branch.

INFORMATION. All communications with reference to the work of the Institute and membership therein should be addressed to:

Secretary, American Institute of Criminal Law and Criminology, Madison, Wisconsin.

DUES. The annual dues of the American Institute are \$2.00. The annual subscription to the JOURNAL is \$3.00, thus giving all the advantages of the Institute and the JOURNAL for \$5.00 per year. The annual dues of the state branches are such as each state branch may fix. Where a state branch is organized, residents of that state must join through it and membership will include membership in the American Institute.

OFFICERS. The general officers of the Institute and Executive Board are:

PRESIDENT:

Quincy A. Myers, Justice of the Supreme Court of Indiana, Indianapolis, Ind.

VICE PRESIDENTS:

Charles A. DeCourcy, Justice of the Supreme Judicial Court of Massachusetts, Boston, Mass.

Dr. Katharine B. Davis, Commissioner of Corrections, New York City.

Frank H. Norcross, Justice of the Supreme Court of Nevada, Carson City.

Dr. William A. White, Superintendent Government Hospital for Insane, Washington, D. C.

Dr. David C. Peyton, Superintendent State Reformatory, Jeffersonville, Ind.

TREASURER:

Bronson Winthrop, 32 Liberty St., New York, N. Y., of the New York Bar.

SECRETARY:

Henry W. Ballantine, Madison, Wis., Professor of Law in the State University.

EXECUTIVE BOARD:

For the term expiring 1914:

Henry M. Bates, Dean of the School of Law, State University, Ann Arbor, Michigan.
Wm. E. Mikkil, Professor of Law in the University of Pennsylvania, Philadelphia, Pa.
A. H. Eald, Judge of the Circuit Court, Wausau, Wisconsin.
E. Ray Stevens, Judge of the Circuit Court, Madison, Wisconsin.

For the term expiring 1915:

Edwin M. Abbott, of the Philadelphia Bar, 819 Land Title Bldg., Philadelphia, Pa.
Wm. N. Gemmill, Judge of the Municipal Court, Chicago, Ill.
George W. Kirchwey, Professor of Law, Columbia University, New York City.
Edward J. McDermott, of the Kentucky Bar, Lieutenant Governor of Kentucky, Louisville, Ky.

For the term expiring 1916:

Arthur J. Todd, Professor of Sociology, University of Pittsburg.
Dr. William Healy, Director of the Juvenile Psychopathic Institute, Chicago, Ill.
Emmett S. Parker, Justice of the Supreme Court of Washington, Olympia, Wash.
Edwin Mulready, Commissioner of Probation, Court House, Boston, Mass.

Ex-Officio:

John H. Wigmore, Professor of Law in Northwestern University, 31 W. Lake St., Chicago, Ill.

Nathan William MacCheesney, of the Chicago Bar; Commissioner on Uniform State Laws, 30 N. LaSalle St., Chicago, Illinois.

John B. Winslow, Chief Justice of the Supreme Court of Wisconsin, Madison, Wisconsin.

Orrin N. Carter, Justice of the Supreme Court of Illinois, Chicago, Ill.

Frederic B. Crossley, Managing Director of the Journal of the Institute, Librarian of the Elbert H. Gary Collection of Criminal Law and Criminology, Northwestern University, 31 W. Lake St., Chicago, Illinois.

Robert H. Gault, Managing Editor of the Journal of the Institute, Associate Professor of Psychology in Northwestern University, Evanston, Illinois.

A HALF TOLD TALE OF SEVEN HUNDRED YEARS AGO.

WILLIAM RENWICK RIDDELL.¹

In the year of our Lord 1220, Henry III was king of England, a lad of thirteen though he had been king for four years, succeeding his unfortunate father John Lackland—unfortunate in his life, more unfortunate in those who have told his story.

Though the king was a child, he had eminently capable servants; not the least capable, the judges of his bench. One of these has left in mediaeval Latin, inscribed on mediaeval parchment, a record of proceedings in court which even now is of interest.

In Trinity Term of that year, William of Knapwell, the bailiff of Saher, Earl of Winchester, came before the Justices of the Bench sitting in Hertford, and lodged a complaint. The earl himself had gone on a crusade and was to die the same year at Damietta; but he had left much of his affairs in William's hands.

The complaint was that two of the earl's men, Stephen and Philip (family names were not yet common) were conducting a damsel named Matillis (Maud) along the king's highway between St. Albans and Hedge Farm (which lies a little south of St. Albans) on the Tuesday before Ascension Day, when John of Marston came with William, his brother, and some others and by force and arms took away the damsel and robbed Stephen of a cape and a counterpane, two sheets and a scapulary worth half-a-mark or more. All this Stephen offered to prove by his body as the court should consider. The complainant said that Maud was the daughter of Geoffrey of Berneville who held land of the earl, and that Geoffrey had died, so that Maud became a ward of the earl, and that the earl when he departed for Holy Land, left this part of his business to him, his bailiff.

In those days in England (as now in England and Ontario) no man but the king owned land; all inferior holders of land held their lands of the king or of some intermediate lord; and when, (speaking generally) an inferior holder—"tenant"—of land died, in those days his lord had the right of wardship over the infant children left behind. He could sell the infant in marriage; if he tendered the child a match of reasonable equality "without disparagement" the ward must accept or be mulcted in the value of the marriage, (*valorem maritagii*), while if the infant married without permission, double the value was forfeited, at least if a boy ventured to do so. Where the infant had

¹Justice of the Supreme Court of Ontario.

property his wardship was profitable to the lord. Love sounded very well, but business is business.

John of Marston is sent for and gives his account of the transaction, which is as follows:

Geoffrey of Berneville had two daughters, Maud and an elder sister Alice. When Geoffrey died, the earl sold the wardship of the two girls to John of Littlebury that he might marry Alice to his son and heir John, and Maud to a younger son, Saher. Son John married Alice and had already four sons by her, but it happened that a certain church fell vacant, and Saher, preferring church promotion to married life, declined the marriage arranged for him with Maud and was admitted to the church. John, the elder son, did not like to see the property of Maud go out of the family, but desired to retain the whole of the inheritance; and accordingly placed his sister-in-law in the Abbey of Sopwell, intending to make her a nun.

When Maud discovered John's scheme, she found means to send for John of Marston, who came to her at her request. When he came, she told him that John of Littlebury and his friends desired to make a nun of her and that she did not wish to be a nun. She so talked and made love to him (*adamavit eum*) that he married her then and there in the very Abbey.

John of Littlebury came to the Abbey, and when he discovered that she had married, he, with the assistance of some of the Abbot's men, took her away toward the Abbey of St. Albans, of which his wife's nephew was Abbot. As they were thus on the way to St. Albans, John of Marston met them; and when Maud saw him she cried aloud to him and said her enemies were carrying her off by force, that they might kill her or make a nun of her. He said that numbers were against him and told her he would not fight for her; and when she heard this she slipped off her horse and ran after her husband. And that was the way he recovered his wife.

John of Marston went further in his plea. He said that afterwards John of Littlebury came with John of Shelford and others to the nunnery at Sopwell and took there a counterpane and two sheets and carried them off towards St. Albans; one Geoffrey Hopeshot, a man of Maud's, met them, and when they asked him whose man he was, he said John of Marston's and that he was on his way to the nunnery at Sopwell for a counterpane and two sheets. Thereupon John of Littlebury said the bedclothes were his and that Geoffrey was a thief. They took hold of him and bound the bedclothes on him and took him off to St. Albans. There they threw him into prison and

are actually taking proceedings against Geoffrey for stealing the very same bedclothes they now accuse John of Marston of stealing.

Accordingly John of Marston says: first, that they are taking these proceedings against him for hate and spite (*per odium et athiam*); and in any case the champion they offer, Stephen, is a hired champion, who the very day before, had fought a judicial battle at Huntingdon.

It will be seen that John of Marston was accused of two offenses, the taking away of a ward, and the theft or robbery of certain chattels. The taking away of an heiress without her consent to marry her was made a felony in the times of Henry the Seventh by 3 Hen. VII, c. 2; what the status of such an offense at the common-law seems to be doubtful, at all events it was a civil wrong against the lord who had her in ward.

Then he is charged with theft of certain goods, and an appeal of battle is offered by the body of Stephen.

John of Marston puts in issue the taking away of Maud, and says it was her own act; he does not explain the synchronism of her forced journey to St. Albans and his being in the road with his brother and some friends—such things will happen; neither does he explain how Maud was able to elude her enemies who were on horseback when *sponte cecidit de equo suo et secuta fuit eundem Johannem virum suum*.

As to the alleged theft, William of Knapwell could not make an appeal regularly, that could at the time be done only by an eyewitness. The proper form would be for some one who saw the theft and who had an interest in the subject-matter to make the appeal. Stephen might do this for any chattels of his own which were alleged to be stolen, but a hired champion was not allowed in judicial combat. A man might "*pro Deo et non pro denariis*" fight for his lord, an infant, a woman, or an old or infirm man, but if he become a champion for money and this were discovered before the justices, the duel would not go on; he would be tried by a jury and if found guilty he was liable to lose foot and fist. There was one case in Essex in this very year in which one Elias Piggun had been condemned for such an offense to lose his foot and "be it known that by the action of the King's Council he is dealt with mercifully, for by law he had deserved a worse punishment."

Moreover, if an appeal were alleged by the accused to be made from spite (*odium et athia*) this was inquired into; and if it were proved, the appeal was quashed. At the present time it makes not the slightest difference what motive may induce a plaintiff to proceed at

law; his legal rights are not affected by evil motives. In laying a criminal charge the motive becomes of importance if the charge fail and the prosecutor is sued for malicious prosecution.

There were many *indicia of odium et athia*, amongst them, a different description of the goods, or of the place of the theft, of the thief, etc., given at another time. And so narrow was the application of that principle that a variance, now of no importance, might vitiate the whole proceedings; e. g., in 1221 Richard Rodeknight of Itchington, charged Richard, Guy's son, with causing the burning of his house. At the County Court he had charged him with burning the house himself, and as the charge before the justice in Eyre was of having procured the burning, the appeal was quashed. In those days *Qui facit pro alium facit per se* was not universally accepted; many a superior escaped while his subordinate suffered the extreme rigor of the law. It may be said that the quashing of the appeal did not prevent the charge being enquired into by a jury. The jury, however, found that Richard Rodeknight's own son had burnt the house.

In the present case John of Marston charged as proving the *odium et athia*, the alleged fact that Geoffrey Hopeshot had been charged with stealing the articles he, John, now was accused of stealing, or some of them.

The earl's bailiff was called on for his reply. He said that while the earl did give the marriage of Alice to John of Littlebury, he did not give that of Maud; he retained the wardship of Maud and caused his bailiffs to place her in the Abbey at Sopwell, and there she stayed until she was stolen in manner aforesaid. He demands judgment, as John of Marston had admitted that he married her without permission of her lord and denies that she ever was married to John of Marston until after he had taken her away by force.

He asserted that Stephen was not a hired champion; that he never was "the man" of any one but the earl, and that the battle he fought was by the earl's command for one of the earl's knights, Adam of Port.

He then makes a departure, and claims that it was from Philip Boiard, the other "man," that the articles were stolen; and Philip offers to fight John of Marston on that issue. Philip also denies that the bedclothes were taken in the way John had described, and denies that Geoffrey ever was taken "*cum pannis, sicut predicum est.*"

John of Marston was then asked by what warrant he married Maud, and he said "by Maud's free will." He challenges the allegation of the complainant that Maud had not been given by the earl to John of Littlebury; and in that view claims that he did not take her

from the earl's custody, but that she escaped from the custody of John of Littlebury who wanted to make her a nun.

The bailiff reiterates that she was in the Earl's wardship when he left on the crusade, and adds, that having great confidence in John of Littlebury and his wife, the earl entrusted Maud to them that they might place her in the Abbey of Sopwell for safe keeping; and that this is so is very evident because "*idem Johannes nichil [nihil] clamat in illa custodia.*"

It was by this time plain that Maud had been in charge of John of Littlebury, whether as a mere bailiff of the earl as the complainant alleged, or as grantee of her *maritagium* as the accused set up. If the latter were the case, the earl had no cause of action. The judges thought it inadvisable to proceed in the absence of John of Littlebury, and accordingly they directed him to be summoned to declare what right he had in the wardship of Maud and if she was in his custody how she went out of his custody. In the meantime John of Marston was clearly wrong; he had married some one's ward without warrant, and must answer for the wrong. He was accordingly ordered to find sureties that he would "stand to right." He gave two, Richard of Marston and Reginald Taillebois. Had he failed to give good and substantial security the practice would probably have been followed; "*Plegii ejus gaola,*" (his pledges the gaol).

Well authenticated records enable us to say what would be the subsequent proceedings.

If Philip Boiard press his claim and it be determined that it is not taken for spite, a battle will be awarded and a day set. A piece of ground sixty feet square is measured out, appellor and appellee are armed with a staff an ell long; they take the oath to the justice of their claim and against sorcerous protection, and fight from sunrise till one be killed (not a common occurrence), or one pronounce the horrible word "craven," or till the stars appear in the evening—the judges in their robes sitting by to see that all is fair and legal. Indeed, sometimes the king himself desired to see the fight. The year after he came to the throne John commanded the Justices of the Bench that the duels which had been ordered between Ranulph of Launcells and Hugh of Stoddon and between William of Burnsland and Richard of Durham, both cases of robbery, be put before the king himself "*quia ea vult videre.*" If either should be killed, Heaven had given judgment; if the accused be vanquished and pronounce the word "craven" to save his life, he is thereafter infamous, no "*liber et legalis homo,*" disqualified from sitting on a jury or giving evidence as a witness; and moreover he must answer in damages to the man he has wronged. If

it be the accused who fails, who cannot or will not fight longer, he will be adjudged to be hanged immediately; if the stars appear before the fight is ended, the appellee is acquitted.

Then if the robbery of the damsel (domicella) Maud be pursued, John of Littlebury will appear and state his case. If he assert and prove his wardship of Maud, William representing the earl will be nonsuited, the earl having no claim; and William may be imprisoned and almost certainly will pay a fine to the king, being in mercy for a false appeal.

If, however, it be found that the earl remained entitled to the wardship of the damsel, the next question to be determined will be the truth as to the marriage. If John of Marston and Maud duly intermarried in the nunnery of Sopwell, his offense is light, he had a right to his wife, even if she did not run to him of her own motion. But he must pay the damages suffered by the earl; he has given pledges. If they did not so marry, but William is right when he says that there was no marriage until after the fracas on the king's highway between St. Albans and Hedge Farm, John of Marston may find his case rather more unhappy. Then the question of the initiative of Maud in effecting a change of custody would become material. But it is idle guessing what was the outcome, *cetera desunt valde deflenda*.

This story which gives a vivid impression of the condition of matters in England seven centuries ago, is to be found in a publication of the Selden Society, "Select Pleas of the Crown, Vol. 1," edited by the late F. W. Maitland; and the volume contains dozens of cases quite as interesting and many more extraordinary. And yet they tell us "Law is dry."

YALE LAW JOURNAL

VOLUME XXII

NUMBER 7

MAY, 1913

CONTENTS

DISCHARGE OF CONTRACTS 513

Arthur L. Corbin, Yale Law School.

DIVORCE IN ENGLAND, THE UNITED STATES AND CANADA . . . 531

F. P. Walton, McGill University, Montreal, Can.

SETTLEMENT OF INTERNATIONAL DISPUTES BY AND BETWEEN THE
ENGLISH SPEAKING NATIONS 545

William Renwick Riddell, Toronto.

COMMENTS 554

BOOK REVIEWS 560

EXTRAORDINARY ANNOUNCEMENT

For Early Publication

The Principles of Judicial Proof

As given by Logic, Psychology, and General Experience and
Illustrated in Judicial Trials.

Compiled by John Henry Wigmore, Professor of the Law of Evidence in Northwestern University, author of "A Treatise on the System of Evidence in Trials at Common Law," "A Pocket Code of Evidence," etc. About 1300 pages. 8vo., law buckram, \$6.00 net, delivered.

This book aspires to offer, though in tentative form only, a novum organum for the study of Judicial Evidence. It presents the results of a detailed examination of logic and psychology as shown in judicial trials,—a probative science independent of the artificial rules of procedure; hence, it can be and should be studied by every trial lawyer.

The eminent author has, for illustrations, drawn freely on the verbatim reports of actual trials and famous psychological studies, presenting his own conclusions fortified by abundant authorities.

The present work seems to be the first attempt in English, since Bentham, to call attention to the principles of Judicial Proof (distinguished from Admissibility) as a whole and as a system.

THE MODERN CRIMINAL SCIENCE SERIES

A series of Translations of the most important works of eminent Continental authors on Criminal Science, chosen by a committee appointed by Prof. John H. Wigmore of the Northwestern University, Chicago, and issued under the supervision of the American Institute of Criminal Law and Criminology.

The great importance and value of "The Modern Criminal Science Series" have already been widely recognized by the press, and a large list of subscriptions has been received. While the interest in the study of criminal science has been noticeable for some time past in the publication of valuable suggestive monographs, "The Modern Criminal Science Series" draws directly from the real fountain sources and affords translations of the wealth of material, to the preparation of which the greatest specialists of the age have given their lives.

The series comprises nine volumes, 8vo., Cloth, \$42.00 net. For only a short time longer, subscriptions will be received at a discount of twenty per cent from the above amount, making the net cost of the set \$33.60. It is not necessary to pay the whole amount in advance. The volumes are sent prepaid to subscribers and each volume paid for on delivery. The present favorable opportunity should not be neglected.

NOW READY

1. MODERN THEORIES OF CRIMINALITY. By C. Bernaldo de Quires, of Madrid. Translated from the Second Spanish Edition by Dr. Alfonso de Salvio. 8vo. Cloth, \$4.00 net.
2. CRIMINAL PSYCHOLOGY. By Hans Gross. Translated from the Fourth German Edition by Dr. Horace M. Kallen. 8vo. Cloth, \$5.00 net.
3. CRIME, ITS CAUSES AND REMEDIES. By Cesare Lombroso, late Professor of Psychiatry and Legal Medicine in the University of Turin. Translated from the French and German editions by Henry P. Norton, M.A. 8vo. Cloth, \$4.50 net.
4. THE INDIVIDUALIZATION OF PUNISHMENT. By Raymond Saleilles. Professor of Comparative Law in the University of Paris. Translated from the Second French Edition by Rachel Szold Jastrow. 8vo. Cloth, \$4.50 net.
5. PENAL PHILOSOPHY. By Gabriel Tarde. Translated by Rapelje Howell. 8vo. Cloth, \$5.00 net.

IN PREPARATION

6. CRIME, AND ITS REPRESSION. By Gustav Aschaffenburg. 8vo. Cloth, \$4.00 net.
7. CRIMINOLOGY. By Raffaele Garofalo. 8vo. Cloth, \$4.50 net.
8. CRIMINALITY AND ECONOMIC CONDITIONS. By W. A. Bongers. 8vo. Cloth, \$5.50 net.
9. CRIMINAL SOCIOLOGY. By Enrico Ferri. 8vo. Cloth, \$5.00 net.

LITTLE, BROWN & CO., Publishers, 34 Beacon St. BOSTON

SETTLEMENT OF INTERNATIONAL DISPUTES BY AND BETWEEN THE ENGLISH SPEAKING NATIONS*

An interesting study is afforded by the methods in which the English-speaking peoples—the United States on the one hand and Britain (including Canada) on the other—have settled matters of dispute since the recognition of the independence of the former in 1782. The story begins with “Jay’s Treaty” of 1794.

By the Treaty of Utrecht, April 11, 1713, France “delivered to the Queen of Great Britain” much territory, including “all Nova Scotia or Acadia with its ancient boundaries.” What these ancient boundaries were, continued to be in dispute, the French contending for the Kennebec, the English, and especially the English Colonists, for the St. Croix, as one boundary. By Article II of the Definitive Treaty of Peace, September 3, 1783, it was agreed that River St. Croix should form a part of the boundaries of the United States; but disputes arose as to what river was meant by the “St. Croix”.

1°. Article V of the Treaty of 1794 provided that to decide what river is the St. Croix” one Commissioner should be appointed by the King and one by the President, “and the said two Commissioners shall agree on the choice of a third, or if they cannot so agree, they shall each propose one person, and of the two names so proposed, one shall be drawn by lot in the presence of the two original Commissioners.” The Commissioners, Judge David Howell of Rhode Island, Col. Thomas Barclay of Nova Scotia and Judge Egbert Benson of New York (who had been agreed upon by the other two), made their award in 1798 at Providence, finding that the St. Croix emptied into Passamaquoddy Bay and was the Scudiac.

2°. Article VI provided for the determination of the amount of losses and damages sustained by British subjects from being prevented from recovering from American citizens, debts incurred before the peace. The Commissioners were to be appointed,

*By the Honorable William Renwick Riddell, L.H.D., LL.D., Justice, Supreme Court of Ontario (Appellate Division).

NOTE.—There is no pretence to originality in this paper; and all persons are invited to make such use of it as they see fit.—W. R. R.

two by the King, two by the President, the fifth by the unanimous voice of these four, "and if they should not agree in such choice, then the Commissioners named by the two parties shall respectively propose one person, and of the two persons so proposed, one shall be drawn by lot in the presence of the four original Commissioners." Three were to constitute a board, provided one on each side and the fifth Commissioner were present. The United States appointed Thomas Fitzsimons of Pennsylvania and James Innes of Virginia; Britain, James Macdonald and Henry Pye Rich, and John Guillemard was appointed by lot. Great practical difficulties arose in this arbitration, and the American representatives, Fitzsimons and Sitgreaves (who had been appointed in Innes' place at his death) withdrew from the conference. After much negotiation between the governments, it was agreed by the Convention of January 8, 1802, that the United States should pay £600,000 in full of all demands.

3°. Article VII of Jay's Treaty provided for the determination of the amount of claims against Britain for irregular and illegal captures during the war with France. Five Commissioners were to be appointed, as in Article VI. Christopher Gore of Massachusetts and William Pinkney of Maryland were appointed by the United States. Dr John Nicholl (who was not long after succeeded by Dr. Maurice Swabey) and Dr. John Anstey, by Britain. Col. John Trumbull of Connecticut, best known perhaps as an artist, was chosen by lot as fifth Commissioner. After some delay, most of it due to the troubles under Article VI, the Commissioners successfully completed their labors in 1804.

Then came the wholly unnecessary War of 1812-1814, which settled nothing. Articles of peace were signed which made no mention of the ostensible reasons for the war—and the only effects of that war were blood and anguish, wounds and death to thousands of gallant soldiers, tears and affliction to thousands of widows and orphans, wasteful expenditure of treasure and a legacy of hate. The Treaty of Peace, December 24, 1814, entered into at Ghent, provided for several matters of arbitration.

4°. Article IV was concerning the ownership of the Islands in Passamaquoddy Bay. It was agreed that each Government should appoint a Commissioner—that these should meet and if they agreed, should make an award—and if they differed, should each report to his Government and then the matter should be left to some friendly State or sovereign.

Col. Thomas Barclay was appointed for Britain and John Holmes of Massachusetts (as then constituted, but of what was afterwards to become Maine), for the United States. These two met and each yielded "part of his individual opinion", thereby enabling them to concur in an award which was made in New York, November 24, 1817. This gave all the islands to Britain except Dudley, Frederick and Moose Islands (the last named having been taken possession of by the British during the War of 1812).

5°. One of the boundaries laid down in the Definitive Treaty of Peace in 1783 was a line running due north from the source of the St. Croix to the Highlands, then along the Highlands to the northwesternmost head of the Connecticut River. This had been a matter of dispute and accordingly Article V of the Treaty of Ghent provided for its determination in precisely the same way as the Passamaquoddy Islands.

Col. Thomas Barclay and Cornelius P. Van Ness of Vermont were appointed Commissioners; they met but ultimately were unable to agree, and reported to their respective Governments.

6°. Article VI provided for the determination of the boundary at the River Iroquois or Cataraquy, Lake Ontario, Lake Erie and Lake Huron, with the connecting rivers, by Commissioners appointed in the same way. Britain first appointed John Ogilvy of Montreal, and at his death in 1819, Anthony Barclay of Nova Scotia, son of Col. Thomas Barclay, so often named; and the United States appointed Peter Buel Porter of Niagara County, New York. After much discussion they agreed upon a line and made their award at Utica, June 18, 1822.

The Treaty of Ghent, 1814, had provided for the restoration by each party of all territory, places and possessions "of the other taken during the war or after the conclusion of peace." The United States claimed that this covered slaves who had been received as voluntary fugitives or otherwise. This Britain disputed.

On October 20, 1818, a convention was entered into which, amongst other things, covered the cases of these slaves.

7°. By Article V, it was agreed that the question of the liability of Britain for these slaves should be referred "to some friendly sovereign or State". The Emperor of Russia was selected, whether because he was an expert on slaves or not does not appear. He, April 22, 1822, made his award, holding Britain liable for these

slaves. Thereupon the two nations at once, July 12, 1822, entered into a new convention, proclaimed January 11, 1823, in reference to the price to be paid for the slaves. The provisions of this convention are sufficiently curious.

8°. By Article I a Board is provided for of two Commissioners and two Arbitrators, one of each to be appointed by each country. These four are to meet as a Board. Then Article II provides that the four or a majority of them, shall fix the average value to be placed on each slave—and if a majority cannot agree, then recourse should be had to the arbitration of the Minister or Agent of Russia at Washington. The Commissioners appointed were Langdon Cheves of South Carolina and George Jackson; the Arbitrators were Henry Seawell of North Carolina and John McTavish. A unanimous award was made September 11, 1824.

9°. Then came in force Article III of the Convention. This provided that when the average value of the slaves should have been determined, the two Commissioners should form a Board to determine the actual amount of compensation for slaves and other private property. If they disagreed on any point, Article V provided that they should draw by lot the name of one of the Arbitrators and then these three constitute the Board. Many difficulties arose in the enquiry and at length it was agreed, November 13, 1826, by the Governments themselves, that Britain should pay \$1,204,960 in full of all claims on this head.

10°. The Northeast boundary still continued a troublesome matter, and September 29, 1827, the parties agreed to leave the determination of this boundary to "some friendly Sovereign or State". William, King of the Netherlands, was chosen. He made his award January 10, 1831. The United States Minister at The Hague protested, and Britain agreed to waive the award. The line was ultimately agreed upon by Webster and Lord Ashburton, August 9, 1842.

11°. There were outstanding certain claims by British subjects against the United States and claims by American citizens against Great Britain. February 8, 1853, a Convention was entered into for the settlement of these claims. By Article I, each Government was to appoint one Commissioner. They were to select a third person to act as an arbitrator or umpire, and if they could not agree on the umpire, each was to name some person and then one of those named should be chosen by lot. Nathaniel G. Upham

of New Hampshire, and Edmund Hornby were appointed. After considerable sparring, Martin Van Buren, who had been President of the United States, was selected as umpire; but he declined, and Joshua Bates, an American citizen living in London, was chosen. This Commission successfully disposed of 115 claims, allowing only 31; and held their last meeting in January, 1855.

By the Convention of October 20, 1818, American fishermen were to have the right to take fish in Canada, New Brunswick, Nova Scotia and Prince Edward Island waters, subject to certain reservations. Of course the fishermen could not agree upon what places were reserved, and when on June 5, 1854, the "Reciprocity Treaty" was entered into, it was provided that these places should be determined.

12°. By Article I it is provided that each Government shall appoint a Commissioner and they an arbitrator or umpire—if they cannot agree, then each to name a person and select by lot. M. H. Perley of New Brunswick and G. G. Cushman of Maine were appointed Commissioners, and John Hamilton Gray of New Brunswick chosen umpire by lot. Mr. Cushman was succeeded by Benjamin Wiggin, and he by John Hubbard, and he by E. L. Hamlin; Mr. Perley by Joseph Howe of Nova Scotia. These Commissioners delimited substantially all the territory in controversy.

For many years there was a dispute as to the boundary line of the United States at the Northwest. Britain claimed down to the mouth of the Columbia River, between 46° and 47° N. L., the United States up to the line 54° 40'. In 1818 it was agreed to leave the territory in dispute open for ten years to settlement, etc., for subjects and citizens of either power. Several attempts were made to fix the dividing line, but in vain. In 1827 the ten years were extended indefinitely. Polk's election was fought and won on the cry, "Fifty-four forty or fight"—but in 1846 it was agreed to abide by the line of the 49th parallel of latitude. This left some land of British subjects within the United States.

13°. In a treaty July 1, 1863, by Article I, provision was made for each Government to appoint one Commissioner—these were to select an arbitrator or umpire, and if they could not agree, the King of Italy should appoint. The Board was to determine the possessory rights of the Hudson Bay Company and all other British subjects. Alexander S. Johnson of New York and Sir John Rose

were appointed, and they selected Benjamin R. Curtis as umpire. But the two Commissioners agreed in awarding the Hudson Bay Company \$450,000, and the Puget Sound Agricultural Company \$200,000, September 10, 1869, without calling on Mr. Curtis.

During the Civil War certain vessels intended to prey upon the commerce of the United States were permitted to sail from British ports, and they did great damage to American trade-ships. These were the *Alabama*, the *Shenandoah*, and others. The United States claimed against Britain for the damages done by these ships—the “Alabama claims” being the generic term employed.

14°. By the Treaty of Washington, May 8, 1871, Article I, it was provided that the “Alabama Claims” should be referred to a tribunal of arbitration composed of five arbitrators, one to be appointed by each party, one each by the King of Italy, the President of the Swiss Confederation, and the Emperor of Brazil—or if any one or more of these rulers or parties failed to appoint, the King of Sweden and Norway should name in his or their stead. Sir Alexander James Edmund Cockburn, Bart., Lord Chief Justice of England, and Charles Francis Adams of Boston, were appointed by the two powers concerned; the King of Italy nominated Count Frederick Sclopis; the Swiss President, M. Jacques Stampfel, and the Emperor of Brazil, Baron d'Itajubá. This was the celebrated “Geneva Arbitration”. An award was made September 14, 1872, of \$15,500,000 (Cockburn dissenting). This was promptly paid.

15°. There were other claims on the part of citizens of the United States against the British government for acts during the Civil War, *e. g.*, the *St. Alban's* Raid from Montreal, the capture of American steamers on Lake Erie, and the like. There were also claims by British subjects against the United States for property taken or destroyed, illegal arrest or detention, etc. All these, by Article XII of the Washington Treaty, were to be determined by a Board of three Commissioners, one to be appointed by each Government, and one by the two Governments jointly, and if they could not agree, by the Spanish representative at Washington. James Somerville Frazer of Indiana and Russell Gurney were first appointed, and then the two Governments jointly appointed Count Louis Corti, Italian Minister at Washington. They met at Washington, and later at Newport, rejected all the nineteen

American claims and allowed 181 out of the 478 British claims; and awarded September 25, 1873, the sum of \$1,929,819 in all. This was promptly paid.

16°. The fishing privileges of American citizens were enlarged, for a term of years, by Article XVIII of the Treaty, but the United States agreed to pay for the extended privilege. Accordingly, Article XXII referred to a Board of Commissioners to fix the amount to be paid. This Board was by Article XXIII to be composed of three Commissioners, one appointed by each party, and the third by the Governments jointly—or, if they could not agree, by the Austrian Ambassador at London. Sir Alexander T. Galt and John H. Clifford of Massachusetts were appointed. Clifford dying, was succeeded by Ensign H. Kellogg of the same State. The Governments failed to agree upon the third Commissioner and asked the Austrian Minister to appoint; but shortly after, agreeing upon M. Maurice Delfosse, Belgian Minister at Washington, they asked the Austrian Minister to appoint him, which was done.

The Commission met at Halifax, Nova Scotia, and, November 23, 1877, made an award of \$5,500,000 (the American Commissioner, Mr. Kellogg, dissenting). There was much discontent in the United States at the award, but the amount was paid within the time limited by the treaty.

17. In the Treaty of 1816, fixing the International Boundary, it was agreed that the line should be the 49th parallel “to the middle of the channel which separates the Continent from Vancouver’s Island and thence southerly through the middle of the said channel and of Fuca Straits to the Pacific Ocean”. There are three channels which have a fair claim to be called “the channel”, and a dispute arose as to which was meant in the treaty.

By Article XXXIV of the Washington Treaty, it was agreed to leave this to the Emperor of Germany. He decided, October 21, 1872, in favor of Haro Channel, thus giving effect to the claim of the United States.

Seal fishing gave rise to considerable trouble. The United States asserted a sovereignty in the Pacific Ocean which Canada, with the support of the Mother Country, refused to acknowledge. Canadian ships were seized and their officers fined and imprisoned, and great international irritation was felt.

18°. After much negotiation, a treaty was entered into February 29, 1892, Article I referring the jurisdictional rights of the United

States to a tribunal of seven arbitrators, two to be named by each Government, and one each by the President of France, the King of Italy, and the King of Sweden and Norway. Article VIII gave the Board jurisdiction to determine damages to be paid. The United States appointed Mr. Justice John M. Harlan of the Supreme Court, and Senator John T. Morgan; Great Britain, Lord Hannen (a Lord of Appeal in Ordinary), and Sir John S. D. Thompson (then Minister of Justice for Canada, having previously been a Justice of the Supreme Court of Nova Scotia, and afterward becoming Prime Minister of the Dominion); the President of France appointed Baron Alphonse de Courcel; the King of Italy, Marquis Emilio Visconti Venostà; the King of Sweden and Norway, M. Gregers Gram.

The Board met at Paris in 1893. The substantial question as to the right of the United States to seals outside the three-mile limit was decided adversely to the American claim (the American Commissioners dissenting), and August 15 all signed an award. The amount of damages was not decided by this Board.

19°. On February 8, 1896, a Convention was concluded at Washington, referring the amount of damages to a Board of two Commissioners, one to be appointed by each Government. These were, in cases in which they were unable to agree, to refer such cases to an umpire to be appointed by the two Governments jointly, or if they could not agree, by the President of the Swiss Republic. The United States appointed William L. Putnam of the Circuit Court of Appeals; Britain, George Edwin King, of the Supreme Court of Canada. It was not found necessary to appoint an umpire. These two eminent judges agreed upon an amount and made an award, December 17, 1897, of \$473,151.26, which sum was forthwith paid by the United States.

The regulations agreed upon at Paris were enforced by statute.

20°. The boundary between the United States and British Territory by this time was well settled, except at Alaska, and there there was much uncertainty and difficulty. July 22, 1892, there was concluded a convention for joint surveys of the line; but surveyors cannot decide matters of this kind. On January 24, 1903, a convention was entered into for the submission of the matter to "six impartial jurists of repute". Britain appointed Lord Alverstone, Lord Chief Justice of England; Sir Louis A. Jette, Lieutenant Governor of Quebec (formerly Chief Justice in that Province), and

John Douglas Armour, Justice of the Supreme Court of Canada (previously Chief Justice of Ontario). Mr. Armour dying, Allen Bristol Aylesworth, K. C., of Toronto (afterwards Sir Allen Aylesworth, Minister of Justice of the Dominion), was appointed in his stead. Elihu Root, Senator Henry Cabot Lodge of Massachusetts and Senator George Turner of Washington were appointed on the other side. They met in London in 1903, and on the 20th of October of that year made an award (the Canadian representatives dissenting, but Lord Alverstone joining in the award).

21°. The Treaty of 1818, giving privileges to American citizens in respect of fishing in the Atlantic waters, drying and curing fish, etc., was not very definite; and constant friction showed itself between the two peoples. After many fruitless attempts at settlement, an agreement was entered into at London, April 4, 1908, to refer the whole matter to a Tribunal of Arbitration chosen from the general list of members of the Permanent Court at The Hague, Article 5. There were chosen George Gray of the Circuit Court of Appeals; Sir Charles Fitzpatrick, Chief Justice of Canada; Dr. H. Lammasch, of the University of Vienna and an Aulic Councillor, Jonkheer A. F. De Savornin Lohman, of the Netherlands and Dr. Luis Maria Drago of the Argentine Republic. They met at The Hague in 1910 and made an award unanimous in all respects, except that Dr. Drago dissented on one point.

These are the specific instances of reference to decision by arbitration, etc. A consideration of the general treaties, as well as of the manner of selecting the tribunals, I reserve for another paper.

William Renwick Riddell.

Toronto, March 12, 1913.

YALE LAW JOURNAL

SUBSCRIPTION PRICE, \$2.50 A YEAR.

SINGLE COPIES, 35 CENTS.

EDITORIAL BOARD,

CHARLES RAYMOND BENTLEY, 1913, *Chairman.*

FRANK KENNA, Graduate,
Business Manager.

CHARLES E. CLARK, 1913,
Secretary.

IRVING M. ENGEL, 1913.

THOMAS C. FLOOD, 1913.

COVEY F. GRIDER, 1913.

EDGAR B. KIXMILLER, 1913.

STANLEY P. MEAD, 1913.

HARRY H. PORTER, 1913.

PATRICK B. O'SULLIVAN, 1913.

FIDARDO R. SERRI, 1913.

CORNELIUS J. SULLIVAN, JR., 1913.

PAUL R. BARTLETT, 1914.

CARROLL C. HINCKS, 1914.

ALBERT J. HARNO, 1914.

GEORGE R. JACKSON, 1914.

BUCKINGHAM P. MERRIMAN, 1914.

ROBERT D. LORENZ, 1913.

JOHN W. LOWRANCE, 1914.

Published monthly from November to June, by students of the Yale Law School.
P. O. Address, Drawer Q, Yale Station, New Haven, Conn.

If a subscriber wishes his copy of the JOURNAL discontinued at the expiration of his subscription, notice to that effect should be sent; otherwise, it is assumed that a continuation of the subscription is desired.

LACHES OF STOCKHOLDERS SUING ON BEHALF OF THE CORPORATION.

The case of *Pollitz v. the Wabash Railroad Co., et al.*, 100 N. E., 721, decided in the New York Court of Appeals last December, involves an interesting point as to the doctrine of laches. The facts, sufficient for the purposes of this discussion are these: Five directors of the Wabash Railroad Co. about August, 1904, consummated an agreement, the effect of which was to place in their hands stock of the Wabash Company to the amount, par value, of \$10,000,000. In June, 1906, James Pollitz, plaintiff in this action, became a stockholder in the company. In December, 1909, his request to the company to institute this action was refused. He thereupon brought suit for damages against the company and the five directors, alleging that the securities received by the company in consideration for the stock were absolutely worthless, that the transaction was fraudulent and had resulted in damage to the company to the extent of \$10,000,000. The prayer of the bill was that the company have judgment against the individual defendants for \$10,000,000 with interest, and that they be compelled to account to the company for their official conduct as officers or directors during the period, and pay to the company the loss it sustained as the result of the wrongful and illegal transactions set forth.

YALE LAW JOURNAL

VOLUME XXII

NUMBER 8

JUNE, 1913

CONTENTS

THE WEBB ACT	567
<i>Allen H. Kerr.</i>	
SETTLEMENT OF INTERNATIONAL DISPUTES BY AND BETWEEN THE ENGLISH SPEAKING PEOPLES	583
<i>Hon. William Renwick Riddell, L.H.D., LL.D., Justice Supreme Court of Ontario.</i>	
THE PASSING OF THE LEGAL PROFESSION	590
<i>George W. Bristol.</i>	
COMMENTS	614
RECENT CASES	621
BOOK REVIEWS	633
SCHOOL AND ALUMNI NOTES	634

Woodward on Quasi Contracts

The need of this book, which contains a fully-detailed analysis and classification of quasi-contractual obligation and a large citation of authorities, has been manifest for some time. The author is an experienced teacher of the subject and his work will be of the highest value to student, professor and lawyer.

"He has done his work carefully and thoroughly. His book cannot fail to be of real assistance to all students of the law. A very full index and the citations of many recent cases will make it equally serviceable to the practitioner."—HARVARD LAW REVIEW, April 1913.

THE LAW OF QUASI-CONTRACTS. BY **FREDERIC C. WOODWARD**
Professor of Law in Leland Stanford Junior University. 8vo.
477 pages. Law buckram. \$3.00 net, delivered.

The Principles of Judicial Proof

Prof. John H. Wigmore, author of "Wigmore on Evidence," has compiled an invaluable work on "The Principles of Judicial Proof as Given by Logic, Psychology, and General Experience, and Illustrated in Judicial Trials. This book aspires to offer, though in tentative form only, a novum organum for the study of Judicial Evidence. It presents the results of a detailed examination of logic and psychology as shown in judicial trials,—a probative science independent of the artificial rules of Procedure; hence, it can be and should be studied by every trial lawyer. The eminent author has, for illustrations, drawn freely on the verbatim reports of actual trials and famous psychological studies, presenting his own conclusions fortified by abundant authorities.

THE PRINCIPLES OF JUDICIAL PROOF as Given by Logic, Psychology, and General Experience and Illustrated in Judicial Trials. Compiled by **JOHN HENRY WIGMORE**, Professor of the Law of Evidence in Northwestern University. About 1300 pages. 8vo. Law buckram. \$6.00 net, delivered.

Bigelow on the Law of Estoppel

This work has long been recognized as a legal classic. In all courts where the common law forms the basis of jurisprudence, it has been cited by the bar and quoted from the bench as few other legal authorities have been. Twenty-three years have elapsed since the publication of the former edition, and in this new sixth edition the decisions of that period have been carefully examined, analyzed, and noted, with the result that about 2,000 new cases have been added to the previously full citations.

THE LAW OF ESTOPPEL and its Application in Practice. By **MELVILLE M. BIGELOW**. Sixth Edition, 1913. 8vo. Over 900 pages. Law buckram. \$6.50 net, delivered.

SETTLEMENT OF INTERNATIONAL DISPUTES BY AND BETWEEN THE ENGLISH SPEAKING PEOPLES*

(SECOND ARTICLE.)

*By the Honorable William Renwick Riddell, L.H.D., LL.D.,
Justice, Supreme Court of Ontario (Appellate Division).*

Thus far particular treaties and conventions have been spoken of; it remains to consider the general agreements.

*“In 1908, April 4, a general Treaty of Arbitration between the United States and Great Britain was signed at Washington. This provided (Article I) that differences which might arise of a legal nature or relating to the interpretation of treaties existing between the two contracting parties, and which could not be settled by diplomacy, should be referred to the permanent Court of Arbitration established at The Hague by the convention of July 29, 1899, provided they did not affect the vital interests, the independence or the honor of the two contracting States and did not concern the interests of third parties.

“Article II provides that in each individual case the parties were to conclude a special agreement defining the matter in dispute, the scope of the powers of the arbitrators and the times to be set for the several stages of the procedure.

“A provision of very great significance to a Canadian appears in the Treaty. The British Government reserved the right before concluding a special agreement in any matter affecting the interests of a self-governing Dominion of the British Empire to obtain the concurrence therein of the Government of that Dominion.

“This was not indeed the first time the concurrence of the colony had been provided for; in the Treaty of Washington (1871) it was provided that certain parts of the Treaty were not to come into force until legislation had been passed by the colonies concerned.”

* The quotations are from an address before the American Society for the Judicial Settlement of International Disputes, delivered December 15, 1910, published (in part) by the Maryland Peace Society, February, 1911, as No. 5 of their Series of Publications.

NOTE.—There is no pretence to originality in this paper; and all persons are invited to make such use of it as they see fit.—W. R. R.

It was under this General Treaty that The Hague arbitration (21° above) was held.

This Treaty, it will be seen, applies to the whole British Empire: but there is another international arrangement which (as I said in an address at Washington some years ago) "may be called a miniature Hague tribunal of our own just for us English-speaking nations of the Continent of North America."

This "Treaty of 1909 was preceded by the constitution of a board of commissioners. This board was formed at the request of the President, acting under the authority of the River and Harbor Act approved June 13, 1902. The functions of the proposed board were defined in the Act and were substantially a full investigation of the question of the boundary waters; and the board was to consist of six members, three appointed by the United States and three by Canada. The President, July 15, 1902, communicated through the American Ambassador at London with the British Government, that government transmitted the invitation to the government at Ottawa, the Canadian Government accepted the invitation, and this acceptance was communicated to the American Government. The American part of the board was appointed in 1903 and the Canadian in 1903 and 1905; and work was begun with all convenient speed on the Sault Ste Marie Channel, the Chicago Canal, the Minnesota Canal, etc. This board has done an immense amount of very valuable work already.

"The Treaty of 1909 was really at the instance of that board."

Signed January 11, 1909, this "Waterways Treaty" provides "for the establishment and maintenance of an International Joint Commission of the United States and Canada—three appointed by each government—which commission should (Article VIII) have jurisdiction over and pass upon all cases involving the use, obstruction or diversion of the waters between the United States and Canada. But Article IX contains an agreement that all matters of difference between the countries involving the rights, obligations or interests of either in relation to the other or to the inhabitants of the other along the frontier shall be referred to this commission for inquiry and report. Article X provides that any questions or matters of difference involving the rights, obligations or interests of the United States or of Canada, either in relation to each other or to their respective inhabitants may be referred for decision to this International Joint Commission. If the commission be equally divided, an umpire is to be chosen in the manner provided by Act 45 of The Hague convention of October 18, 1907."

It will be seen that "every dispute involving the rights, obligations or interests of the United States or of the Dominion of

Canada either in relation to each other or to their respective inhabitants may be referred to the commission by the consent of the two countries.

"It is hard to see how a more comprehensive clause could be framed; and if the Treaty had provided that such dispute "shall" be referred, the work would be perfect. As it is, the Dominion must give consent through the Dominion Cabinet. That is an easy task. We have a government which is united—it must be united or it could not stand—and which in this instance does not need to go to Parliament for authority."

It is not always the case that a Canadian Parliament will consent to an international agreement made by the Government; then the Government must take the opinion of the electorate (a recent example will occur to everybody)—but in this instance, the Government may act without the consent of Parliament.

"But in the United States the action must be by and with the advice and consent of the Senate; and sometimes, as is well known, trouble arises in the Senate about confirming treaties.

"Each reference to the Commission will or may be but equivalent to making a new treaty. Had the provision been that the consent might be given by the President of the United States, the position of the parties on the two sides would have been much alike.

"Better even than this would be a provision making the arbitration of the commission apply automatically. If such a provision proved unsatisfactory, the treaty could be denounced and a new treaty negotiated. But I suppose there may be some jealousy on the part of the Senate, or perhaps the Constitution prevents. And we Canadians notice that the Constitution of the United States prevents a great many things being done over which we should have no trouble at all."

The Rush-Bagot Convention of 1817 cannot fairly be called an agreement of the kind we have been considering—it was designed to prevent troubles arising, not to settle them after they had arisen. It may be well, however, to say a word about it here.

"During the War of 1812 much damage had been done by armed vessels upon the Great Lakes. The Treaty of Ghent did not provide that such armed forces should not be kept up; but it became apparent to both sides that it would be well strictly to limit the number and quality of armed vessels upon the fresh waters between the two countries. After some negotiation notes were interchanged April 28 and 29, 1817, containing the "Rush-Bagot convention," which notes contained an agreement by one

and the other party limiting the naval force to be kept on the lakes to a very few: on Lake Ontario one vessel, on the Upper Lakes two vessels, on Lake Champlain one vessel, none of the vessels to exceed one hundred tons burden, and each to have but one cannon of 18 pounds. It was agreed to dismantle forthwith all other armed vessels on the Lakes, and that no other vessels of war should be there built or armed; six months' notice to be given by either party of desire of annulling the stipulation.

"The arrangement was after some delay submitted by the President to the Senate, and that body in 1818 approved of and consented to it."

This understanding has continued up to the present time—perhaps not always so strictly observed as might be desired.

"The understanding was, however, in great danger in 1864. The Minister of the United States in London was instructed in October of that year to give the six months' notice required to terminate the agreement; and Mr. Adams did so, with the subsequent approval of Congress. Before the lapse of the time specified, however, matters on the lakes had taken a different turn, and the United States expressed a desire that the arrangement should continue and be observed by both parties. This was acceded to and all parties thereafter considered the convention to be in full force."

I say nothing of Treaties which have been negotiated and have failed of ratification, or of negotiations which proved fruitless even diplomatically.

It is by no means without interest to note the various methods of selecting the trial tribunal.

(a) The first scheme was for each party to appoint one representative, and before entering upon the enquiry, these two to select a third Commissioner; in case of their inability to agree, this third to be selected by lot from two named, one by each Commissioner. This made a board of three commissioners throughout. Nos. 1°, 11°, 12°.

(b) In the same Treaty another clause provided for five Commissioners, two appointed by each party and the fifth chosen as in the scheme (a). This arbitration was about money, which has always been a most important matter in the "Anglo-Saxon" world. Three Commissioners were enough to determine a mere matter of territory, but when it came to be a question of determining the amount of money to be paid, five were needed. (Even at the present day a rough can kick his wife's ribs in with a pen-

alty of 30 days in the workhouse or common gaol, but let him steal a two-dollar bill and it is five years in the penitentiary.) This scheme is, however, practically the same as the former. Nos. 2°, 3°.

(c) Not very different was the appointment of one representative by each Government, and the third by the Governments jointly, if they could not agree the third to be appointed by a foreign potentate or his representative. Nos. 15° (the Spanish Minister at Washington), 16° (the Austrian Ambassador at London).

(d) Or instead of forming a board thus, the Commissioners appointed by the parties were directed to enter upon the enquiry, and in particular cases where they were unable to agree, they were to call in an umpire. This umpire might be selected by lot from persons named by the two Governments (No. 9°) or by the Commissioners, with a provision as in (e) (No. 13°, 19°).

(e) The Commissioners may not be allowed to appoint an umpire: but must, if possible, dispose of the difficulties themselves—in case of failure, reporting to their respective Governments (Nos. 4°, 5°, 6°), or having recourse to an agent of a foreign power (No. 8°).

(f) A board may be formed of an equal number of representatives appointed by each party. No. 20°.

(g) Or an equal number appointed by each party and three others by foreign powers. Nos. 14°, 18°.

(h) A friendly sovereign may be asked to determine the matter in dispute. (Nos. 7° (the Emperor of Russia), 10° (the King of the Netherlands), 17° (the Emperor of Germany).

(i) Finally the Tribunal of Arbitration provided by The Hague may be appealed to. No. 21°.

Success in determining the questions submitted has generally been achieved. Nos. 2°, 5°, 9°, 10°, were exceptions—No. 5°, from the difficulties inherent in the subject matter: the same remark applies partially to No. 10°, but in this case there was a neglect to decide judicially. No. 2° seems to have been hampered by faults of temper but there does not seem to have been any good reason why the difficulties in both this case and in No. 5° should not have been overcome. The two Governments, however, took the short cut and determined the matters themselves.

In the cases in which an award was made there does not seem to have been any feeling of injustice, or at least any considerable public expression of such feeling in Nos. 1°, 3°, 4°, 5°, 6°, 7°, 8°.

11°, 12°, 13°, 15°, 17°, 18°, 19°, 21°,—the award in No. 10° was repudiated by the United States with the consent of Great Britain. The Alabama award, No. 14°, was received with considerable indignation in Britain, where Sir Alexander Cockburn's conduct was very generally approved.

No. 16°, the Halifax Award, was equally objectionable to many in the United States, and No. 20°, the Alaska Award, created much anger amongst the Canadian people, a large proportion of whom thought they had been tricked in the constitution of the Board and that the decision given was not a judicial decision, but acquiesced in for diplomatic reasons.

In none of these cases, however, notwithstanding the fact that the representatives of the losing party refused to concur in the award, was there a repudiation. The anger was short-lived and little if any evil after effect remains. The right which every unsuccessful litigant has of damning the judge was freely exercised; that acted to a certain extent as a safety valve, and the indignation has blown off. Perhaps the most marked success has been achieved in the last award. Made as it was by judges and jurists of repute, the Court determined everything (except one minor point) by a unanimous judgment: and even in the point upon which there was a dissent, those directly representing the two contending nations agreed in their opinion. Both parties, too, were perfectly satisfied with the result, and no word of complaint was heard against the Court or any member of it, or against the award or any part of it. *O si sic omnia*. After all the experiments, the true way seems to have been found.

There is another consideration which may be mentioned. The savage has probably as much law as the most civilized—the main difference is that with the former each case is decided without regard to any other, past or future, or to any general rule. As men become more civilized, they look before and after, law becomes systematized, the king or judge (the terms are not seldom synonymous) no longer gives a sentence the result of direct inspiration in the particular case, but rather one in accordance with a general rule believed to be on the whole advantageous to the community.

An arbitration bears the same relation to a Court as the separate isolated judgment in a separate isolated case bears to a judgment based upon a general rule. No one can draw any principle of international law or any rule for national conduct from the

decision of a board of arbitrators—they decide simply what seems advisable in the particular case.

But once establish a Court with anything like a permanent Constitution and the case is different—principle must take the place of mere expediency. The decisions of a permanent Court are, as a matter of course, reported, and in any case are a guide for the Court in all future references.

And what is, perhaps, still more important, a Bar will form whose business it is to study decisions of this Court, to deduce principles therefrom and assist the Court in arriving at a decision in accordance with the true principles. No one who knows how the Bar in English-speaking countries has strengthened the Courts and aided them in maintaining the confidence of the people needs to be told of the advantages of a strong Bar. Nothing better has yet been devised to do justice and give every man his due than an impartial Court aided by a learned Bar. The Hague offers the first and the second would soon grow up around the Court.

It is not too much to hope that arbitration will disappear and judicial decision be the rule, at least between these kindred nations.

In any case, the worst result by such peaceful means, even by arbitration, is better than the best by war.

William Renwick Riddell.

Toronto, April 12th, 1913.

THE PASSING OF THE LEGAL PROFESSION

One of the largest, if not the largest, associations of lawyers in this country, recently dropped from its roll eight hundred and sixty-nine members for failure to pay their annual dues. Many of them, the association's report states, did not want to be dropped, but could not spare the moderate sum of ten dollars per year. This was a most startling report and caused many to ask, "Why are so many members of the legal profession in such an impecunious condition?" The answer to the question is "changed conditions". The practice of law has become commercialized. It has been transformed from a profession to a business, and a hustling business at that. Financial interests have looked upon the legal profession with longing eyes, and have gradually corralled it and brought it under their domination for the profits which can be acquired from it. Within the recollection of men living, the practice of law was conducted by the lawyer, a man who was looked up to in the community as a member of a dignified profession, a leader in politics and society. To-day the practice of law is not carried on by the lawyer except in a limited way. The great bulk of litigation, while it may be actually done by a lawyer, or a man who has been admitted to the Bar and is entitled to call himself a lawyer, is conducted by corporations which have neither soul nor conscience, and owe allegiance to no code of ethics or morals, and which have no other cause for existence than the accumulation of wealth for directors and stockholders. The lawyer's former place in society as an economical factor has been superseded by this artificial creature of his own genius, for whom he is now simply a clerk on a salary.

I.

One of the most lucrative branches of the lawyer's practice was formerly real estate law. When a man bought a piece of real estate he employed a lawyer to search the title, and tell him whether it was good or not. If a man had money to loan on bond and mortgage, he turned it over to his lawyer to make the loan and search the title. To-day the real estate lawyer is a thing of the past. If a man buys a house he does not go to his lawyer. He goes to a Title Company. The company searches

UNIVERSITY OF PENNSYLVANIA LAW REVIEW

AND

AMERICAN LAW REGISTER

FOUNDED 1852

CONTENTS

The New Jurisprudence	—Simon N. Patten	1
	OF THE UNIVERSITY OF PENNSYLVANIA	
The Courts of Ontario	—William Renwick Riddell	17
	JUSTICE OF THE SUPREME COURT OF ONTARIO, APPELLATE DIVISION	
Intoxication as a Defense to an Express Contract	—Sidney J. Dudley	34
	OF THE HAMPTON BAR, VIRGINIA	
Notes		45
Recent Cases	- - - - -	55
Book Reviews	- - - - -	69

Copyright, 1913, by the University of Pennsylvania.

Entered as second class matter at the PHILADELPHIA, PA., Post Office.

Published Monthly except July, August and September by

The Law School, University of Pennsylvania

at 236 Chestnut Street, Philadelphia, Pa., and

Thirty-Fourth and Chestnut Streets, Philadelphia, Pa.

\$2.50 Per Annum

35 Cents Per Number

THE COURTS OF ONTARIO

At the time of the Conquest of Canada in 1759-60, the law was French, the *Coutume de Paris* with slight modifications. After a short period of military rule, the Royal Proclamation of 1763 introduced the law of England both civil and criminal. No objection was ever made in Canada to the criminal law of England but the French Canadians were much dissatisfied with the change in the civil law.

Accordingly the Quebec Act was passed by the Imperial Parliament¹ which left the criminal law unchanged but reintroduced the French law for civil cases. Considerable agitation followed this reinstatement of the previous law; some immigrants were from the Mother Country and the American Colonies further south, who desired the law to which they were accustomed. So far the western part of Canada had no great interest in the matter, there were no settlements of any consequence in what was to become Upper Canada and finally Ontario. But with the peace of 1783 and the recognition of the independence of the United States, it became manifest to the loyalists of America that they must seek another home if they desired to retain their allegiance. Many of these made their way across the rivers into Canada, settling chiefly on the left bank of the St. Lawrence, the Niagara and the Detroit; they also desired English law.

The French Canadian was still wedded to his own law. The new Canadian further west desired his familiar law, the common law of England which he claimed, and with reason, as his birth-right.

It was thought wise to give to each the right to select his own law, and in 1791 was passed the Canada Act.² This divided Canada into two parts, Upper Canada and Lower Canada, with practically the same territory as the present Province of Ontario and Quebec; Upper Canada, however, still (and till 1796) in-

¹ (1774) 14 George III. C. 83.

² 31 George III C. 31.

cluded Detroit and Michilimackinac. Each Province was given a Legislature so that it might make its own laws.

Before the passing of this Act, what was to become Upper Canada was by Lord Dorchester divided into four districts, and a Court of Common Pleas with unlimited jurisdiction was instituted in each district. The Court of King's Bench already in existence had criminal and appellate civil jurisdiction over all Canada, and criminal trials were held before judges appointed as Commissioners of Oyer and Terminer and General Gaol Delivery. Courts of Quarter Sessions existed also for each District, composed of Magistrates, Justices of the Peace of the District. The jurisdiction of these courts may be learned from a perusal of Blackstone's Commentaries.

Such was the state of affairs when the first Parliament of Upper Canada met at Newark, now Niagara, September 17th, 1792.

The first Act of this Legislature was to introduce the English law in civil matters. The second was to introduce trial by jury which had no place in the French system. This change dislocated the practice in the Courts of Common Pleas and necessitated a change in the system. In 1794,³ a Court of King's Bench was erected for the Province and the Courts of Common Pleas were abolished. The Court of King's Bench was given the powers of the Courts of King's Bench, Common Pleas and Exchequer in England, and had as judges the Chief Justice of the Province and two *Puisné* Justices. This Court has never been abolished, but has been continued into the Supreme Court of Judicature for Ontario.

In 1837,⁴ the number of *Puisné* Justices was increased to four, but the business was found to be too heavy to be satisfactorily disposed of by one superior court. Upper Canadians have always been and continue to be intolerant of legal delays; and it was determined to erect another common law court, which was done in 1849.⁵ A new court, the Court of Common Pleas, was called into existence, presided over by a Chief Justice

³ 34 George III. C. 2 (U. C.).

⁴ Act of 7 William IV. C. 1 (U. C.).

⁵ 12 Vic. C. 64 (Can.).

and two *Puisné* Justices and with the same powers and jurisdiction as the Court of King's, then become Queen's, Bench, while the number of *Puisné* Justices in the Queen's Bench was reduced to two as at first. By the same Act a change was made in the Court of Chancery. In 1837,⁶ was established a Court of Chancery for the first time in the Province, the Governor to be Chancellor and a judge to be appointed "The Vice Chancellor of Upper Canada." This was not found wholly satisfactory and accordingly the Act of 1849 reconstructed the Court with a Chancellor and two Vice-Chancellors.

The Courts of Queen's Bench, Common Pleas and Chancery continued in existence as separate courts, the two former as courts of common law, the last as a court of equity, till 1881.

The original Act of 1794 established a Court of Appeals to hear appeals from the King's Bench, to be composed of the Lieutenant Governor of the Province (or the Chief Justice) with two or more of the Executive Council. The Act of 1837 made this court a court of appeal also from the Court of Chancery.

The proceedings of this court were not so unsatisfactory as might have been expected. The Governor did not in fact sit; and there was generally, if not always, a sufficient number of judges, members of the Executive Council to draw from, to make this court truly judicial. Indeed, it may fairly be compared to the House of Lords where in theory every Peer might sit on appeals, but in fact, from a somewhat remote period, no Peer other than a lawyer ever did sit.

It was thought best, however, to change the system to one more logical. The Act of 1849 abolished the Court of Appeals and established a Court of Error and Appeal to hear appeals from both the two common law courts and the court of chancery. This new court was composed of the judges of the three courts, very like the Court of Exchequer Chamber in England, except that this last did not hear appeals from Chancery. In 1874⁷ this court was reconstituted and thereafter consisted of five judges who had no other duties than to sit as judges of the Court of Appeal.

⁶ 7 Wm. IV. C. 2 (U. C.).

⁷ 37 Vic. C. 7 (Ont.).

Then came the revolutionary Judicature Act of 1881,⁸ which was modelled after the English Act. This Act abolished the distinction between law and equity, giving preference to the rules of equity, united and continued the three courts of original jurisdiction and the Court of Appeals into the Supreme Court of Judicature for Ontario with two divisions: 1. The Court of Appeal with five judges; 2, the High Court of Justice with twelve judges. The High Court of Justice was composed of three divisions, corresponding to the three Courts which were by the Statute combined: the Queen's Bench Division, the Common Pleas Division and the Chancery Division, each with a Chief Justice (or in the Chancery Division, a Chancellor), and two *Puisné* Justices. Later a fourth division was added to the High Court, the Exchequer Division, with a Chief Justice and two *Puisné* Justices.

By the Law Reform Act of 1909,⁹ which came into force January 1, 1913, the Supreme Court of Judicature for Ontario has become the "Supreme Court of Ontario" with two branches; 1, The Appellate Division of the Supreme Court of Ontario; 2, The High Court Division of the Supreme Court of Ontario. The former is only appellate while the latter is a court of original jurisdiction; but any judge of the Supreme Court of Ontario may sit in any division or branch. The divisions of the High Court of Justice are abolished. The Appellate Division consists of two divisional courts which have the same jurisdiction, unless the state of business requires more frequent sessions they sit alternate weeks and transact all the business of the Appellate Division. Each divisional court has five judges, four of whom constitute a quorum. The first divisional court is composed of the five judges who constituted the Court of Appeal, the second divisional court of five who have been selected out of and by the High Court judges to serve in Appeal for the year. Another divisional court or more than one to be selected in the same way may be formed if occasion requires.

The Supreme Court of Ontario is the only superior court,

⁸ 44 Vic. C. 5 (Ont.).

⁹ 9 Edw. VII. C. 28 (Ont.).

but there is in each county or union of counties, a County Court, and in the unorganized districts, a District Court. These have jurisdiction up to \$800 in contract; \$500 in trespass, replevin, foreclosure, sale or redemption in mortgage cases and equitable relief generally; \$2000 in partnership actions. Any action may be brought in a County Court and if the defendant does not in writing dispute the jurisdiction of the court, it may continue and be tried in such court. If the defendant disputes the jurisdiction, the action is removed into the High Court on *praecipe*.

Below these come the Division Courts. The whole Province is divided into small divisions, each of which has its own Division Court. The jurisdiction of these courts is up to \$60 in personal actions or to \$100 if the parties consent; in contract where the balance claimed is not more than \$100 and where the amount is ascertained by the signature of the defendant, \$200.

There is no inferior limit to the jurisdiction of any Ontario court, but if an action which could and therefore should have been brought in an inferior court is brought in a higher court, the party so offending may be and generally is punished by having to pay the extra costs occasioned to his opponent.

THE JUDGES.

Every judge of the Supreme Court or any County Court must be a member for ten years of the Bar of Ontario. The Division Courts and Courts of General Sessions are presided over by a County Court judge. All these judges are appointed by His Majesty, *i. e.*, the Dominion Government. A Supreme Court judge cannot be removed without an address from both Houses of Parliament. He is entitled after fifteen years' service or on being permanently disabled to a pension of two-thirds of his salary; after twenty-five years of service, if seventy years of age; twenty years of service, if seventy-five years of age; or after thirty years of service, to his full salary. Only two Superior Court judges have been removed in the history of Upper Canada, the last over seventy-five years ago and both for perfectly justifiable cause.

A County Court judge may be removed by the administration, the Government, for misbehavior, incapacity or inability to perform his duties. This misbehavior is investigated by a Commission of Superior Court judges appointed for the purpose. A very small number have been thus removed.

THE BAR.

There are two classes of practitioners, barristers and solicitors. A lawyer must belong to one; most belong to both. The barrister alone can conduct a case at trial; the solicitor alone files pleadings.

Those in the practice of the law in Upper Canada in 1797 formed a corporation, The Law Society of Upper Canada, which body was reincorporated in 1822 and still exists. In 1794 the Governor was empowered by the Legislature to grant licenses to practice law as attorneys; this was owing to the great dearth in the Province at that time of persons acquainted with the law of England. The power was not abused, only a half dozen or so were thus appointed; and the Law Society has been responsible for practically all the practitioners of law since Upper Canada began her legal career, and in all for more than a century.

Every five years all the barristers in the Province vote by ballot for thirty Benchers, who with certain *ex-officio* members form the governing body, or Bench. Collectively, the Benchers form Convocation; they fix the standard of education, conduct examinations and call to the Bar. It is necessary for the candidate for call to have been an admitted student of law for five years, or for three years if he has a degree of B.A. or LL.B. in some recognized university. After being called by Convocation the young barrister is presented by a Bencher to the court; he is then sworn, and thereafter he has the right of audience. The court does not call to the Bar, and has nothing to do with the curriculum or examinations. Nor can the Court hear anyone not "called" by the Law Society of Upper Canada except a party in his own case. Non-professional agents are allowed in the Division Courts but not in the higher courts.

Convocation has established and maintains the Law School

at Osgoode Hall at which every student must attend; it appoints the principal, the lecturers and the examiners. Convocation also fixes the education of solicitors; and upon examining them grants a certificate of fitness. The same requirements as to time of service as an articulated clerk are imposed as in a case of a barrister. Upon the certificate of fitness being presented to a judge of the High Court, he grants a *fiat* for admission of the candidate as solicitor, and the oath is administered before the judge. Thereafter the new solicitor may practice in all the courts as solicitor.

Every barrister and solicitor pays an annual fee to the Law Society and is subject to discipline of the society at all times. Any member may be removed or disbarred for cause.

There does not seem to be any advantage in retaining the distinction between barrister and solicitor, but as it does no harm, and as we Canadians are an essentially practical people making no pretense of and caring nothing for logical consistency, we do not change simply for the sake of change. If any practical disadvantage were felt from the distinction it would not last six months.

In the profession of barrister there is also a division into King's Counsel and members of the Outer Bar. King's Counsel are appointed by the administration for the time being of the Province. They have the privilege of wearing a silk gown and a peculiar form of coat and waistcoat. All other barristers are "Stuff-gownsmen" and wear a stuff gown. King's Counsel sit in the front row in appellate and weekly courts and have occasionally the right of pre-audience. This is of small value and the distinction of being a King's Counsel is not much of an advantage. It is a relic of English practice and of no practical use but it does no harm and is therefore not abolished.

THE CIVIL PRACTICE.

The Court of King's Bench in Upper Canada from the beginning followed in general the practice of the Court of King's Bench in England; the Court of Common Pleas had the same practice as the Court of King's Bench; the Court of Chancery

followed in substance the English Court of Chancery. When changes were made in the courts of England they were generally followed *non longo intervallo* in Upper Canada. The present practice is almost the same as the present English practice. From the very first there have been some differences due to the requirements of a new country; and at the present time, our practice is, we think, an improvement over that in England.

In the Division Courts the practice is of the simplest form and not unlike that of the County Courts in England; so nothing need be said of it here.

In the County Courts and District Courts the practice is the same as in the Supreme Court; accordingly only the Supreme Court will be spoken of and what is said may be considered to apply *mutatis mutandis* to the County and District Courts.

The keynote of all the practice is to be found in two of the Consolidated Rules:

"The Court or a Judge may at any time amend any defect or error in any proceedings; and all such amendments may be made as are necessary for the advancement of justice, determining the real matter in dispute and best calculated to secure the giving of judgment according to the very right and justice of the case.

"The Court or a Judge may enlarge or abridge the time appointed by these rules or any rules relating to time or fixed by any order for doing any act or taking any proceeding, upon such terms as may seem just; and an enlargement may be ordered although the application is not made until after the expiration of the time appointed or allowed."

Add to these, the provision that facts and not conclusions of law are to be alleged in pleadings and affidavits and the basic principles are all named.

All *actions* are begun by writ of summons. There are, however, many matters which should not be made the subject of an action in the proper sense; for example, the interpretation of a will and the like which involves only matters of law. The executors or some one interested may serve a notice of motion upon some other person interested and bring the question before a single judge in the Weekly Court at Osgoode Hall, Toronto, and after seeing that all persons interested or some one repre-

senting every class have had a chance of being heard, the judge may determine the question in a very cheap, expeditious and consequently a very useful proceeding.

A sheriff or a common carrier may obtain an order of interpleader. In most instances, however, the proceedings are begun by writ of summons, indorsed with a short statement of the cause of action; and this is the case whether the action be in contract or in tort, legal or equitable, for goods supplied or on a mortgage or for slander. In certain cases the cause of action is of such a character as to permit of a "special indorsement," as a debt or liquidated demand in money arising out of a contract, *e. g.*, a promissory note, bond, bill of goods sold and delivered and the like; or the claim may be made under a mortgage for redemption, foreclosure or sale; or it may be asked to wind up a partnership; to compel a trustee to render an account. The writ is served and calls for an "appearance" within ten days, unless the defendant is out of Ontario when a longer time is allowed. An appearance may be entered by solicitor or in person in any case by a mere entry on the books of the registrar's office. There is a registrar in every county town and the appearance is entered in the office from which the writ was issued.

If there is no appearance entered, judgment may at once be entered: if the amount claimed is liquidated the judgment corresponds thereto; if the claim be on a mortgage there is a reference to a Master to take accounts; if arising out of a partnership there is a similar reference to a Master. But if the claim be general an interlocutory judgment is entered and the action goes to trial.

Upon appearance entered, if the indorsement be special, the plaintiff may file an affidavit verifying the cause of action and saying, that in his belief there is no defense, and serve the defendant or his solicitor with a notice of motion for judgment. Then unless the court is satisfied that the defendant has a good defence on the merits, judgment will be given. The practice is not to grant this order if there is a real question to be tried which will, if found in the defendant's favor, entitle him to judgment. A change has been made in the new Rules coming into effect September 1, 1913. Now where a writ is specially en-

dorsed, the defendant must with his appearance file an affidavit that he has a good defence on the merits, showing the nature of his defence and the facts and circumstances which he deems entitle him to defend—he must serve forthwith a copy of this affidavit on the plaintiff, and the appearance is not received without the affidavit. The plaintiff may treat this as a statement of defence—or he may examine the defendant on it, and if it be disclosed that the facts do not constitute a defence move for judgment. In some rare cases, even before appearance, the plaintiff may obtain leave to serve notice of motion for judgment and if he shows special circumstances may obtain immediate judgment. The plaintiff in the ordinary case serves a “statement of claim” which is a statement in ordinary language of the facts as the plaintiff sees them followed by a statement of the relief which he claims. He does not set out the law or conclusions of law.

If the defendant conceives that the facts alleged do not entitle the plaintiff to any relief, he moves the court to strike out the statement of claim and dismiss the action. In the usual case he serves a statement of defence with or without a counter-claim on any cause of action he may have. The plaintiff may in like manner move to strike out any or all of them.

As soon as the statement of defence is served, either party may take out on *praecipe* an order to produce. An affidavit on production and the production of documents can now be obtained by serving a notice requiring one without obtaining an order; but special orders for production may be made at any time. This orders the opposite party to make an affidavit of all documents and copies of documents he may have or have had relating to any matter in question and to produce them. If the defendant does not put in his defence in time, the plaintiff may take out this order when the time is up for defence, *i. e.*, eight days after delivery of statement of claim.

In the same way, at the same period, either party may take out an appointment from a Special Examiner or Master of the court for the examination under oath of his opponent, and if the opponent be a corporation, of an officer of the corporation. Except in the case of a corporation this examination may be read at the trial against, but not for, the party examined; in the

case of a corporation the examination cannot be read at all. The practice of examining before trial puts an end to at least one-third of the cases which otherwise would go to trial.

After the statement of defence there may be a reply, but no subsequent pleading is allowed; everything which is desired to be added is made by amendment. Amendment of pleading is almost a matter of course; but the party whose pleader has made an amendment necessary, is generally obliged to pay the costs of the amendment.

TRIAL.

In every county in Ontario, courts are held for the trial of cases in the Supreme Court. There are generally two jury and two non-jury sittings annually, but in the larger cities they are more frequent. In Toronto the non-jury court is practically continuous. At a jury sitting, non-jury cases may be set down as well as jury cases.

In the cases of slander, crim. con., seduction, malicious arrest, malicious prosecution and false imprisonment, a jury is as of right; in any other case if either party wants a jury he will serve a jury notice. Notwithstanding the jury notice the trial judge may in his discretion (and there is no appeal from his discretion) strike out the jury notice and try the case himself. And though there is no jury notice served, the judge may direct the case to be tried by a jury. Ten jurors may render a verdict. The number of cases tried by a jury is not large and is decreasing proportionately every day. In cases tried by a jury, except in cases of slander and a few others, it is the almost invariable practice to ask the jury to give answers to questions of fact submitted to them in writing, and in such cases the jury have no right to give a general verdict. The judge enters the proper judgment upon the answers of the jury. If he considers any of the answers has no evidence to support it, he disregards such answer; but he cannot order a new trial.

If either side is dissatisfied with the judgment, on fact or law, he may appeal to the Appellate Division which is composed of five judges. That court may in its discretion hear further evidence, but seldom orders a new trial for rejection of evidence;

as a rule if evidence has been wrongly rejected, it is heard before the court itself.

In certain cases of importance an appeal may be taken from the Appellate Division to the Supreme Court of Canada or to the King in Council, but these are rare.

Speaking generally there is no reason why any litigant, if he so desires, cannot have his case tried within six months of the issue of the writ—in many places within three months. If he desires to appeal, his appeal can be disposed of within two months of the trial. Even if the opinion of the final court of the Empire is taken, a year and a half is generally more than sufficient for all proceedings, from writ to Privy Council judgment.

In all our courts there are two cardinal principles kept steadily in view: all amendments must be made in pleadings that are necessary to establish all the facts; and judgment is to go to him who is entitled to it on the facts, notwithstanding any blunders he may have made in his proceedings. It is impossible for a litigant in Ontario to lose his case for defect in form, though he may have to pay for his lawyer's ignorance or carelessness.

The rule as to amendments is not a dead letter but it is constantly and consistently applied.

THE CRIMINAL PRACTICE.

Before the New York State Bar Association, in January, I gave a *résumé* of our Criminal Practice. I have not been able to improve much on it, defective as it is, and here subjoin it with slight modifications.

At the conquest of Canada by the British, 1759-60, the English criminal law was introduced by the conquerors, though with the exception of a few years the French Canadians were permitted to retain their own law in civil matters. The English criminal law continued to prevail except as modified by Provincial statutes and these statutes in general followed closely the legislation in the Mother Country. The same statement applies to the Provinces of Nova Scotia and New Brunswick. At the Confederation in 1867 the criminal law of all the confederating

colonies was almost identical, while the civil law of Lower Canada (Quebec) was markedly different from that of Upper Canada (Ontario), Nova Scotia and New Brunswick. The Lower Canadian civil law was based upon the custom of Paris and ultimately upon the civil law of Rome, while that of the others was based upon the common law of England. In 1867 the British-American Act which created the Dominion of Canada gave to the Parliament of the Dominion jurisdiction over the criminal law including the procedure in criminal matters. The Provinces, however, retained jurisdiction over the constitution of the court of criminal jurisdiction as well as over property and civil rights.

For some years there were statutes passed from time to time amending the criminal law. At length Sir John Thompson who had been a judge himself in Nova Scotia and was Prime Minister of Canada brought about a codification of criminal law and procedure. He received valuable assistance from lawyers on both sides of the House and the Criminal Code of 1892 became law. This with a few amendments made from time to time is still in force.

The distinction between felony and misdemeanor has been abolished. Offences which are the subject of indictment are "indictable offences," and offences not the subject of indictment are simply called "offences." Certain offences of a minor character are triable before one or two Justices of the Peace as provided by the Code in each case. In such cases there is an appeal from a Magistrate's decision adverse to the accused to the County Court judge; or the conviction may be brought up on *certiorari* to the Supreme Court on matter of law.

Cases triable before Justices of the Peace, are for example: resisting the execution of certain warrants;¹⁰ persuading or assisting an enlisted man to desert;¹¹ challenging to fight a prize-fight,¹² or fighting one,¹³ or being present thereat;¹⁴ carrying

¹⁰ §583.

¹¹ §584.

¹² §104.

¹³ §105.

¹⁴ §106.

pistols,¹⁵ selling pistols or air guns to minors under sixteen,¹⁶ pointing pistols;¹⁷ stealing shrubs of small value;¹⁸ injuring Indian graves;¹⁹ buying junk from children under sixteen.²⁰ But offenses of a higher degree are indictable.

If a crime is charged against anyone, upon information before a Justice of the Peace a summons or warrant is issued and the accused brought before him. Some times he is arrested and brought before the Magistrate without summons or warrant, but in that case an information is then drawn up and sworn to. The Justices of the Peace are appointed by the Provincial Government and as a rule, are not lawyers.

Upon appearance, the Justice of the Peace proceeds to inquire into the matters charged against the accused, causing witnesses to be summoned and hearing in presence of the accused all that is adduced. The accused has the fullest right of having counsel and of cross-examination, as well as that of producing any witness and having such evidence heard in his behalf as he can procure. The depositions are generally taken down in shorthand, but if in long hand, they are signed by the deponent after being read to him.

After all the evidence for the prosecution is in, the Magistrate may allow argument; or he may *proprio motu* hold that no case has been made out and discharge the accused, or he may read aloud all the evidence, unless the accused expressly dispenses with such reading, and addressing the accused, warn him that he is not obliged to say anything but that anything he does say will be taken down and may be given in evidence at his trial. He then asks, "Having heard the evidence, do you wish to say anything in answer to the charge?" If the accused so desires the evidence of the defence is called.

At the close of the evidence if the Magistrate is of opinion that no case is made out the accused is discharged.

¹⁵ §118.

¹⁶ §119.

¹⁷ §122.

¹⁸ §374.

¹⁹ §385.

²⁰ §431.

If a case is made out the accused is committed for trial with or without bail, as seems just, and the witnesses are bound over to give evidence.

Police Magistrates are appointed for most cities and towns, and are generally barristers. In some cases by the consent of the accused they have a higher jurisdiction than the ordinary Justice of the Peace.

The courts which proceed by indictment are the Supreme Court of the Province and the General or Quarter Sessions. Judges of these courts are appointed for life by the Crown, *i. e.*, the Administration at Ottawa, and must be barristers of ten years' standing.

The Supreme Court can try any indictable offence. The Sessions cannot try treason and treasonable offences, taking oaths to commit crime, piracy, corruption of officers, murder, attempts and threats to murder, rape, libel, combinations in restraint of trade, bribery, personation under the Dominion Election Act.

Within twenty-four hours after the committal to gaol of a person charged with any offence which the Sessions could try, the sheriff must notify the County Court judge who acts as judge in the Sessions, and with as little delay as possible bring the accused before him. The judge reads the depositions, tells the prisoner with what he is charged and that he has the option of being tried forthwith before him without a jury or of being tried by a jury.

If the former course is chosen a simple charge is drawn up; a day fixed for the trial and the case then disposed of. If a jury trial be chosen, then at the Sessions or the High Court a bill of indictment is laid before a grand jury²¹ by a barrister appointed by the Provincial Government for that purpose. The indictment may be in popular language without technical averment, or it may describe the offence either in the language of the statute or in any words sufficient to give the accused notice of the offence with which he is charged. Forms given in the Statute may be followed and the following is a sample:

²¹ In Ontario it is composed of *thirteen* persons.

"The Jurors for Our Lord the King present that John Smith murdered Henry Jones at Toronto on February 13, A. D. 1912."

No bill can be laid before the grand jury by the Crown Counsel without the leave of the court for any offences except such as are disclosed in the depositions before the Magistrate. But sometimes the court will allow other indictments to be laid.

The grand jury has no power to cause any indictment to be drawn up; that body simply passes upon such bills as the Crown Counsel lays before it.

Upon a true bill being found, the accused is arraigned, and if he pleads "Not Guilty" the trial proceeds.

He has twenty peremptory challenges in capital cases; twelve, if the offence is punishable with more than five years' imprisonment; and four in all other cases, although the Crown has only four challenges, yet it may cause any number to stand aside until all the jurors have been called.

I have never, in thirty years' experience, seen it take more than half an hour to get a jury even in a murder case, and never but once heard a jurymen asked a question.

In case of conviction the prisoner may ask a case upon any question of law to be reserved for the Appellate Division, or the judge may do it *proprio motu*. The Appellate Division may by leave of the trial judge, entertain an appeal for a new trial upon the ground that the verdict is against the evidence, but this is a rare proceeding.

No conviction can be set aside or new trial ordered although some evidence was improperly admitted or rejected, or something was done at the trial not according to law or some misdirection given, unless, in the opinion of the Appellate Division, a substantial wrong or miscarriage was thereby occasioned at the trial. If the Appellate Division is unanimous against the prisoner, there is no further appeal; but if the court is divided a further appeal may be taken to the Supreme Court of Canada. This is a very rare proceeding.

A wife or husband is a competent witness in all cases for an accused. He or she is compellable as a witness for the prose-

cution in offences against morality, seduction, neglect of those in one's charge and many others. The accused is also competent, but not compellable, in all cases. If an accused does not testify in his own behalf, no comment can be made upon the fact by prosecuting counsel or the judge—if this should be done even by inadvertence a new trial would result.

No more than five experts are allowed on each side.

I have never known a murder case, except one, take four days, while most do not require two even with medical experts.

William Renwick Riddell.

Toronto.

INTOXICATION AS A DEFENSE TO AN EXPRESS CONTRACT

It seems that the earliest discussion in the books in which the question is discussed, whether the mental imbecility of a party at the time of his performance of an act invalidates that act, is to be found in Britton, ch. 28 f. 66, where the plea of insanity was held to be a good defense to an action on a bond. Subsequently grave doubt arose as to the propriety of permitting a man to disable and stultify himself, and it was held by Littleton that the law did not permit a man to plead drunkenness as a defense to either a civil or criminal liability. This principle of law as enunciated by Littleton and fully approved by his great scholastic commentator, Lord Coke, has the support of some few scattered early English authorities, among which are 5 Edw. III, 70; 39 Hen. VI, 42, and 35 Ap. Pl. 10. The doctrine as laid down by Littleton and Coke, is based upon the absurd, irrational and extraordinary reasoning, that if the party was *non compos mentis* at the time of the performance of the act he afterwards desired to invalidate, he could not have known that he executed the act.¹ Notwithstanding the absurdity of the doctrine and the reasoning and strong objections urged in opposition thereto by Fitzherbert, it became so deeply rooted that for a time it prevailed as a maxim of the ancient common law.² In *Stroud v. Marshale*³ it was again held that insanity could not be pleaded as a defense to an action on a bond and in this case the opinion of Fitzherbert, given in N. B. 202, was expressly repudiated, while in *Beverly's Case*⁴ it was even denied that in Fitzherbert's time insanity had been allowed as a defense to an action on a contract, and the maxim of the common law was said to be that "a man shall not disable himself." The adoption of this maxim, if "maxim" it can be called, in the Beverly case was not approved in subsequent cases.

¹ 4 Co. Litt. 172.

² Jenk. Cent. 40.

³ Cr. Eliz. 398.

⁴ Printed in Thomas's & Francis's ed. 2 Reports, 658.

THE CHICAGO SOCIETY

OF

ADVOCATES

1915

"THE LEGAL PROFESSION IN ONTARIO
AND
THE LAW SOCIETY OF UPPER CANADA."

By

THE HONOURABLE WILLIAM RENWICK RIDDELL, LL. D., F. R.
HIST. SOC., ETC., JUSTICE OF THE SUPREME COURT OF ONTARIO.

(Memo. At the request of "The Chicago Society of Advocates," Mr. Justice Riddell addressed them on "The Legal Profession in Ontario" at their inaugural meeting, November 9, 1914. The following contains the substance of his address with some additions, and has been prepared by Mr. Justice Riddell at the instance of the president of the Society.)

So long as Canada remained a French possession there was no distinction in the legal profession. The same person might and often did exercise the function of Advocate or Barrister, Notaire (notary) and even Arpenteur (land surveyor).

No change was made in that respect by the victors on the Conquest in 1759-60, or by the Royal Proclamation of October 7, 1763, which introduced into Canada the English Law, Civil and Criminal. This Proclamation also established a "Province of Quebec" which included in its area not only what is now the Province of Quebec, but also what was afterwards the Province of Upper Canada and is now the Province of Ontario. When the Quebec Act was passed (1774), 14 George III, c. 83¹, it was not considered advisable to modify the existing practice.

¹In Ontario, as in England, it is the custom to cite Statutes, not as of the year *Nostræ Domini*, but as of the year of the reign of the regnant monarch when they were passed. A very convenient practice has however sprung up of prefixing the year of our Lord.

But, April 30, 1785, an Ordinance was made by the Lieutenant Governor, Henry Hamilton², being Ordinance of 25 George III, c. 4; this by Article 1 enacted that thenceforth no one should be commissioned, appointed or permitted to practice as a barrister, advocate, solicitor, attorney or proctor at law who had not served during the space of five years under a contract in writing with some advocate or attorney duly admitted and practicing in the Courts in the Province or elsewhere in His Majesty's Dominions or for six years with some clerk or register of a Court of Common Pleas or Court of Appeals in the Province, with a proviso in favour of those called to the Bar or admitted to practice as an advocate or attorney elsewhere in the Empire. The candidate must also have been examined by some of the first and most able barristers advocates or attorneys in the presence of the Chief Justice of the Province or two or more Judges of the Courts of Common Pleas, and be certified by the Chief Justice or the Judges as of fit capacity and character to be admitted to practice law.

Article 2 makes a similar provision for a notary to serve five years with a notary, and to be examined by some of the eldest notaries in the presence of the Chief Justice of the Province or two or more judges of the Court of Common Pleas of the District wherein he served his clerkship, and to be approved by him or them.

Article 6 provides that thenceforth barristers, advocates, solicitors, attorneys or proctors at law, and also land surveyors, should not practice as notaries; that no notary is to act as land surveyor or barrister, etc.; "that these several occupations of practising the law in His Majesty's Courts in this Province * * * and of notary and of land surveyor shall be held and exercised separately and by different

²Hamilton first appears in the History of this Continent as Governor of Detroit in 1777. The following year he captured Vincennes whose commander Helm was taken prisoner with a small force of defenders. The well-known George Rogers Clark shortly afterwards besieged the fort; and Hamilton was in his turn forced to surrender. He was treated by Clark with much barbarity, and on Jefferson's order was sent handcuffed to Williamsburg where his treatment was still worse. Probably as an effect of a letter from Governor Haldimand to Washington, Hamilton was paroled; and he got to England in 1781. He was made Lieutenant Governor of Quebec in 1784, filling that position a little less than a year. He was a man of no great capacity and but little judgment, although perfectly honest and sincerely desirous of doing his duty. It is probable that the ordinance of April 30, 1785, was due to the influence of the British newcomers in the Province.

persons to the end and purpose that the functions and duties of the one may not interfere with the other." All practitioners were given twelve months to elect which branch of the profession they would follow³.

A strong protest was made against this ordinance by some of the French-Canadian practitioners, but in vain. The distinction between the practitioner in the Courts and the notary still obtains in the present Province of Quebec.

In 1788 four Courts of Common Pleas were established in the territory afterwards the Province of Upper Canada, but then part of the Province of Quebec, one for each district; they were, of course, under the same law and practice.

In 1791 was passed the Act 31 George III, c. 31, commonly called the Canada Act or Constitutional Act, which divided the vast territory of the Province of Quebec into two provinces, the western being called Upper Canada and the eastern Lower Canada, each with its own Parliament and Lieutenant Governor.

The first Act of the first Parliament of Upper Canada (1792) 32 George 3, c. 1 (U. C.) was to introduce the English Civil Law; but no change was then made in the constitution of the profession. There were not many in the Province skilled in the English Law; and, accordingly in 1784 was passed an Act, 34 George III, c. 4 (U. C.) which authorized the Governor to grant a license to any number not exceeding sixteen British subjects to practice as attornies and advocates. This may have been, and probably was, due to the institution of the Court of King's Bench for the Province by the same Statute. The Act suspended for two years the operation within Upper Canada of the Ordinance of 1785.⁴ During all this time and until the coming into force of the Act next to be mentioned, all practitioners were called "to the degree of an Advocate and to that of an Attorney." The original roll of the Court of King's

³The Ordinance is printed in full in both English and French in the volume of "Ordnances * * * the Province of Quebec," 1777 (in the Judges' Library at Osgoode Hall) pp. 67-68.

⁴Those who so received a license were in effect given a monopoly of the practice as they only could charge for their services; and the list included most if not all of the lawyers and some others.

Bench, still extant, sets out the oath to be taken by the applicant and the "degree" conferred.

The Act of 1797, 37 George III, c. 13, (U. C.), was the beginning of our present system. That Act, passed on the 3rd of July, 1797, provided that it should be lawful for the persons now admitted to practice law, and practising at the Bar in the Province, to form themselves into a society to be called the Law Society of Upper Canada, "as well as for the establishment of order amongst themselves, as for the purpose of securing to the Province and the profession a learned and honorable body^s, to assist their fellow subjects as occasion may require, and to support and maintain the Constitution of the said Province." The Society was authorized to frame Rules and Regulations (under inspection of the Judges of the Province as Visitors of the Society) for its own government; to appoint the six senior members or more, for the time being, and from time to time as Governors or Benchers (of whom the Attorney General and Solicitor General for the time being were to be two), and also to appoint a Librarian and a Treasurer.

They were to meet in Newark (Niagara-on-the-Lake) on July 17, 1797, to frame such Rules and Regulations.

Each person practicing at the Bar was allowed to take one clerk for the purpose of instructing him in the knowledge of the laws.

Except those who were practitioners at the time of the passing of the Act, no one should be permitted to practice at the Bar, unless he had been entered of and admitted into the Society as a Student of the Laws, and had remained on the Books of the Society for five years, conformed to all its Rules and Regulations and been duly called and admitted as a Barrister according to the Constitutions and establishment of the Society. Proviso in favor of those who had practised at the Bar elsewhere in His Majesty's dominions, and the time actually served under articles before the passing of the Act should count as part of the five years, *pro tanto*.

^sIn view of the adoption by all Governmental departments and most literary Canadians of the "English" spelling of such words as "honour", etc., it is not without interest to note that in the printed copies of the Statute this word is spelled without the "u."

One might become and act "merely as an Attorney or Solicitor" after due service for five years under articles to an attorney and "standing in the books of the Society" for three years.

This Statute for the first time in our Province established the distinction between Barrister and Attorney, and since it came into effect no one (with an exception shortly to be noted), who had not been called to the Bar by and received the degree of Barrister-at-Law from the Law Society of Upper Canada, has ever been heard by the Courts of the Province. The Courts have no power to permit any other to be heard. There is no international or interprovincial comity or courtesy permitting such a course.

Here at the beginning of the Society is found a marked difference between it and the Inns of Court in London. They have no concern with attorneys (or solicitors), every attorney or solicitor must in Upper Canada have been on the books of the Society for three years, (we shall have occasion later to notice the important change made in 1822 by the Statute 2 Geo. 4, c. 5 U. C.).

Before discussing the functions of the Society, I shall give a brief record of its history to the present time.

Ten practitioners met at Wilson's Hotel, Newark, on July 17, 1797, and organized the Law Society of Upper Canada; and upon that day conferred the degree of Barrister at Law upon all the practitioners who applied therefor (including themselves). One other (William Weekes) applied two years after (in 1799), and received the degree; the remaining four never applied for and never received it. These four constitute the sole exception to the rule that no one could since 1797 address our Courts except those called by the Society.

The Statute did not make the Society a corporation; but it was a mere association of gentlemen with well-defined functions. The absence of incorporation became a drawback, and in 1822 the Act 2 George IV, c. 5 (U. C.) declared "the Treasurer and Benchers of the Law Society for the time being and their successors * * * to be one body corporate and politic."

This led to some difficulty, which, however, was got over by the Resolution of the Benchers in Convocation in June, 1831, Trinity Term, 1 and 2 Wm. IV, that all Barristers and Students-at-Law entered in the Books of the Society were still members of the Law Society of Upper Canada, though not members of the Corporation of the Law Society of Upper Canada; and this state of affairs still continues; the Treasurer and Benchers alone are the Corporation, but all students and barristers duly entered are members of the Society.

The Government of the Society was by the original Act to be by Benchers or Governors appointed by the Society, the six senior members or more for the time being, of whom the Attorney General and Solicitor General were to be two. At its first meeting the members present appointed the Attorney General and Solicitor General and the four senior barristers as Benchers. At a subsequent meeting November 9, 1799, all the existing barristers were appointed Benchers. Thereafter for a time the practice was followed of the existing Benchers appointing a member of the Society from time to time as a Bencher, his appointment being communicated to him by the Treasurer. No Statute, Rule or Resolution can be found authorizing this method of election, but no complaint seems ever to have been made of the Benchers taking this power out of the hands of the Society, who alone could appoint under the Act of 1797. Of course each new Attorney General and Solicitor General was, according to the Statute, appointed forthwith after receiving his Patent.

This self-perpetuating system was put an end to in 1871 by the Ontario Act 34 Vic. c. 15, which instituted a bench of thirty Benchers to be elected by ballot by all the Barristers on the Roll, and also of *ex officio* Benchers, the Attorney General of the Province and all ex-Attorneys General and ex-Solicitors General (there is now no Solicitor General of the Province), and all retired Judges of the Superior Courts. The elected members hold office for five years, when there is a new election.

A natural effect of this was that the older and better known Barristers were elected term after term, and there was little

chance of a young man obtaining the position of Benchers. To avoid this, it was in 1910 enacted by 10 Edw. VII. c. 76 (Ont.) that all those who had been elected at four quinquennial elections should be *ex-officio* Benchers, thus leaving the field open for the younger men. (It had a few years before by (1900), 63 Vic. c. 20, s. I, been provided that every one who had for seven consecutive years held the office of Treasurer of the Society should be an *ex-officio* Benchers.)

The original Act had authorized the Society to appoint a Treasurer. This position did not mean even then simply one who cared for the funds of the Society, but one who was the Head of the Society, President and Chairman. This was an adoption of the terminology of the English Inns of Court⁶.

The Society at the first meeting resolved that "the Benchers according to seniority take upon themselves the Treasurership of the said Society annually." We find no close adherence to this rule. The Attorney General was the first Treasurer, and for one year only; then the Solicitor General⁷ for three; a prominent member of the bar for four; then the new Attorney General for one year; the new Solicitor General for five years; another prominent member of the bar for four years; the next Attorney General for four, and his successor for one. Then July 8, 1819, was passed a rule that the Treasurer should be chosen annually in Michaelmas Term by the majority of the votes of the members then present. July 2, 1831, the date was changed to Hilary Term, and September 1, 1859, back to Michaelmas.

The Statute of 1871, which made Benchers elective, fixed

⁶See for example Herbert's *Antiquities of the Inns of Court and Chancery*, 1804, p. 228. "The officer of Treasurer is of considerable importance * * * He is the Supreme Officer of the whole Society and has the regulation of its concerns. He admits gentlemen into the Society, etc.

The fact that the Attorney-General John White was an English Barrister, probably accounts for the language adopted. White later (January 1800) was shot and killed in a duel with a gentleman whose wife he had traduced.

⁷This was Robert I. D. Gray, the son of a major in the British service. He was a member of the House of Commons of Upper Canada, for the second and third Parliaments.

In October 1804 he accompanied the Judge, Mr. Justice Cochran, another member of the Bar, the High Constable of York (Toronto), two Indian interpreters, the witnesses and an Indian Ojebwa who was captured on Toronto Island (then a peninsula), and was to be conveyed by the Government schooner *Speedy* to the assize town Newcastle (now Presqu'île) for trial. A storm sprang up, and the vessel was lost with all on board, nothing but a hen-coop coming to land.

It is interesting to note that Grey left certain property to his black servant John Baker who was afterwards at the battle of Waterloo as a British soldier and who survived till 1871, the last of all who have been slaves in Canada.

the date for election of Treasurer; the first term after the election of the new Bench and in Easter Term of each year. This still is the rule.

So much for the Law Society itself; we shall now consider its dealings with the Bar.

The first Rule of the Society appointed Benchers; the second was that every member of the Society should enter into a bond with the Treasurer to pay the sum of £5 (=\$20) annually so long as he should continue a member of the Society⁸. In 1831 this was reduced to 11-8 (=\$2.33) per term, or \$9.33 per annum, payable on or before the last day of every term in each year; and in 1833 to 2-6 (=\$0.50) per term or \$2.00 per annum, payable on or before the first day of Michaelmas term, i. e., the third Monday in November. This rule is still in force for Barristers; solicitors now pay \$15 per annum. The third rule of 1797 was that every student in his admission to the Society should pay the sum of £10 (=\$40) and the further sum of £20 (=\$80) when called to the Bar, and enter into a bond to pay annually £5 (=\$20). The annual payment was reduced after call as we have seen in 1831 and 1833. Whether the fee of £5 annually exacted by Rule 2 of 1797 was exacted of the student as a member of the Law Society before his call, does not very clearly appear⁹.

The statutory title of the student admitted on the books of the Society was "Student-of-the-Laws;" this included both those proceeding to the degree of Barrister-at-Law and those intending to become an attorney—technically the former were Students-at-Law, the latter Articled Clerks (the distinction is not always observed). To become a Barrister there was no necessity to serve under articles; to become an Attorney it required five years actual service under articles.

From the very beginning in by far the greater number of cases, an applicant for admission upon the Books of the Society was under articles at the time. Nearly every student became both Barrister and Attorney, but from the first, as

⁸It must not be forgotten that all students duly admitted on the books were and are members of the Society.

⁹January 11, 1808, a rule was passed rescinding previous rules as to fees and requiring every member to pay £5 (\$20); every student upon admission to the books of the Society £5, and the same sum upon being called to the Bar.

now, there were a very few who became Attorneys or Barristers, but not both.

There was at first no entrance examination; but the member proposing a student (generally his master) would certify that the applicant was in his opinion qualified by education principles and habits of life to become a member of the Law Society.

In 1808 (Hilary Term, 58 Geo. 3), a rule was passed that no person should be admitted a member unless he should declare to the Society upon his honor that his application was to enable him to become a resident practitioner, but does not seem to have received the sanction of the Judges. No trace of such a declaration appears in the early Summary of Provisions relating to admission of members, in the Form of Petition prescribed or in the minutes of the Law Society. Up to 1803, the applicant was in practice proposed and admitted at the same meeting; thereafter the proposer was required to give a term's notice of his intention to present the candidate¹⁰.

Applicants must still have their names posted conspicuously for thirty days by the Secretary of the Society, and if no objection be taken they are entered as of the term in which their application was made. Curiously enough much the same practice was followed in the case of three applicants in Easter Term, 56 Geo. 3, 1816.

In 1820 Hilary Term, 60 Geo. 3, a rule was passed that after that term all applicants for admission should be required in presence of the Benchers to give a written translation of a portion of Cicero's Orations or perform such other exercise as might satisfy the Society of their acquaintance with Latin and English composition, "and that no person who cannot

¹⁰John Anderson was the last to be presented under the old practice, Easter Term 41, Geo. 3, 13 April 1801. John Macdonell, afterwards Attorney General of Upper Canada, the first under the new, Hilary Term, 43 Geo. 3, 6th April 1803. Macdonell was Adjutant to Sir Isaac Brock in the campaign of 1812 and was fatally wounded at the Battle of Queenston Heights, gallantly fighting for his country.

give these proofs of a liberal education shall hereafter be admitted upon their books."¹¹

In 1821, a voluntary association called the Advocate Society was formed in York (Toronto) by students-at-law for discussions, moot courts, etc., but it lasted only a very short time, going the way of all such voluntary organizations¹².

In 1825 (July 1st of Trinity Term, 6 Geo. 4), the Law Society took a further step, and required all candidates for admission on its books to exhibit in his examination "a general knowledge of English, Grecian and Roman History, a becoming acquaintance with one of the ancient Roman poets, as Virgil, Horace or Juvenal, and the like acquaintance with some of the celebrated prose works of the ancients such as

¹¹It is at least interesting to note that in examination of a candidate to practice medicine for long after this time, the practice seems to have been to examine in Latin first—a sort of matriculation examination—and to proceed with the professional subjects only if the candidate exhibited some familiarity with that language. We find the Board of Toronto writing the sister Boards in Montreal and Quebec in April 1847:

"The course this Board pursues in the examination of candidates is as follows: 1st. Some acquaintance with the Latin language is required. With this view, if the candidate cannot construe some paragraphs of Gregory's *Conspicua*, a portion of the *Pharmacopoeia Londinensis* or a Latin written prescription is substituted; in the event of a total failure in these, the professional examination is not proceeded in. If the Latin examination is satisfactory, then follow," professional subjects.

It may seem anomalous to begin a professional examination with an enquiry into the knowledge of Latin possessed by the candidate; but it must be borne in mind that in those days everyone of education had some knowledge of Latin—and an ignorance of that language indicated if it did not absolutely prove a lack of general culture.

"Examination for License to Practice Sixty Years ago" by Hon. Mr. Justice Riddell, *Canada Lancet*, June 1913.

After this rule of 1820 the entries in the Law Society's Books read, "the Society being satisfied of his qualifications do admit him on the Books accordingly."

The last to be entered without examination was John Muirhead, and the first to be entered after examination was Marcus F. Whitehead, Nos. 82 and 86 on the Common Roll, (not the Barristers' Roll).

¹²The Books containing the proceedings of this Society are still extant and are safely kept at Osgoode Hall.

There had been a "Junior Advocates Society" which, April 2, 1822, resolved itself into the "Advocate Society" composed of Members of the Law Society only, each paying every Term 3s. 9d (75¢), increased later to 5s. In discussing questions the Rules of the House of Commons were to be observed, all students at Law might attend below the Bar without introduction; every member of the Society might "express his sentiments freely. The elected Prothonotary was required every term to inspect the Rule Book of the King's Bench and enter every new Rule in the Rule Book of the Society. The Society had a Great Seal and a Keeper thereof.

The first meeting was in April 2, 1821 at which several students attended, some of whom afterwards became very well known at the Bar. The last meeting recorded was June 20, 1826.

From the first, the Society was often forced to adjourn its meetings for want of a quorum. I have not found any meeting at which more than nine members were present.

It met until February 1822 in the office of the Solicitor General Henry John Boulton, son of Mr. Justice Boulton, afterwards Chief Justice of Newfoundland; and afterwards the meetings were held in the York Court House.

The qualification that to become a member the applicant must be a member of the Law Society was occasionally relaxed in favour of an Articled Clerk who had not yet been able to pass the preliminary examinations before the Benchers of the Law Society. While it has been said more than once that the Society was composed of Barristers and Students-at-Law I find that only one Barrister was admitted.

It appears from the Minutes that the Students at Law at Kingston formed a similar Society in 1822, and also that there were members of the Society itself residing in many parts of the Province, e. g. Kingston, Port Hope, Hallowell (Picton). It seems to have gone to pieces when Robert Baldwin was called to the Bar.

Sallust or Cicero *De Officiis* as well as his orations * * * and it is also expected that the student will also show the Society that he has had some reasonable proportion of mathematical instruction." This rule was never approved by the judges and never acted upon; it was formally placed in abeyance January 6, 1827. From the written minutes of the Advocate Society already mentioned, it appears that it was by no means an uncommon practice for a student to article himself before he was able to pass the examination; if he was able to pass the examination within two years of entering articles he did not lose time as an attorney, as it was necessary to be five years under articles but only three years on the books of the Society, to be admitted attorney. Even the necessity of being three years on the books was taken away, as we shall see, in 1822.

No supervision was had by the Law Society over the education of the student. If a student at law, he attended the chambers of some barrister; if an articled clerk he served in the office of an attorney, his master. At the end of five years the budding Barrister produced to the Law Society a certificate of the Barrister in whose chambers he had studied that he had so studied for five years, and was called to the Bar by the Society, receiving the degree of Barrister-at-Law. With the mere Articled Clerk the Law Society had nothing further to do than admit him on its books, thereby making him a member of the Society, and to certify at the proper time that he had been on its books for three years. The Articled Clerk appeared before the Court of King's Bench, produced an affidavit by himself of service and a certificate from his master, and was admitted by the Court as an Attorney-at-Law. The Barrister continued to pay to the funds of the Law Society, the Attorney did not.

Then came the Act of 1822, 2 Geo. 4, c. 5 (U. C.) which by section 3 rendered it unnecessary for any Articled Clerk to be entered on the books of the Law Society; so that even the slight control over Attorneys which the Society had by reason of its preliminary examinations ceased. Members of the Law Society thereafter were Barristers and Students-at-Law only.

In 1828 (Hilary Term, 8 Geo. 4, c. 1), a rule was passed that all students to be thereafter entered on the books of the Society should keep four terms at York (Toronto) during their five years entry¹³. At this time the Benchers were considering a scheme for the erection of a building for their meetings. Theretofore they had met in various places, Wilson's Hotel, the Treasurer's Office, the Parliamentary Library, the Court House, etc. In 1820 (Michaelmas Term), 1 Geo. 4, they decided to expend £500 (=\$2,000) in "erecting a building for their use to be called 'Osgoode Hall'¹⁴. They already had a plot of land, but were not satisfied with it, and were negotiating for another site. May, 1828, they bought the present site from the Attorney General, John B. Robinson, for £1,000 (=\$4,000), and proceeded, the next year, to erect what is now the East Wing of Osgoode Hall, having determined to spend about £3,000 (=\$12,000) for that purpose.

The Hall was to contain not only a convocation room, etc. for the Benchers, but also rooms for the Court of King's Bench and bed rooms, dining room, etc. for Barristers and Students-at-Law. Students were expected to keep their terms in the hall about to be built. It was finished in 1832. The first meeting of the Benchers in it was held Thursday, Feb-

¹³This rule was in great measure due to Dr. William Warren Baldwin for that and several other years. He was an Irishman from near Cork, and had graduated in medicine from Edinburgh University. He practised for a time in his native land but toward the end of the 18th century emigrated with his father to Upper Canada in consequence of the troublous times of the Rebellion of 1798. He settled in Durban country (near what is now Bowmansville), and for a short time practiced medicine there. He then came to Toronto and unsuccessfully tried school teaching. He received a license to practise law in 1803 from the Hon. Peter Hunter, the Lieut-Governor, under the Act of that year, and was called to the Bar Easter Term 43 Geo. 3. He became a very active practitioner, Benchers in 1807 and Treasurer 1811-1814; 1824-1828. He was the father of the well-known statesman, Robert Baldwin. It was in great measure due to his efforts that Osgoode Hall was built.

¹⁴Called after William Osgoode the first Chief Justice of Upper Canada. One historian make him an illegitimate son of George III, and certainly he was *persona grata* with that King. After being Chief Justice of this Province 1792-1794, he became Chief Justice of Lower Canada 1794-1801. He then returned to England where he died in 1824, aged 70. He left no mark on our jurisprudence.

This building, erected under the eye of Dr. William Warren Baldwin, was what is now the East Wing, "a plain matter-of-fact white brick building two and a half stories high." The west wing of similar character was begun in 1844 and finished in 1846, and at the same time the two buildings were connected by a building surmounted by a dome. In 1857-60 the whole was renovated, the wings faced with cut stone, the central building replaced by another faced in the same way but without a dome. The central building accommodated the Library and the Courts of Queen's Bench and Common Pleas; the West Wing the Court of Chancery. Part of the East Wing still remains the property of the Law Society, the Law School being built to the rear. The remainder of the building is now the property of the province by deeds of July 1, 1874 and November 26, 1885.

The East Wing was somewhat changed interiorly about 20 years ago, and the Government of the Province has within the last few years made some additions and changes in the way of Court Rooms, Judges' Chambers, etc.

Those acquainted with modern Toronto may be interested to know that Osgoode Hall was beyond the then existing limits of the Town of York.

ruary 6th of that year (Hilary Term, 2 Wm. 4), and all meetings since that time have been held there.

A standing committee called "The Committee of Economy" was formed February, 1833 (Hilary Term, 3 Wm. 4), and charged with "the government, management, and control of the æconomical household and domestic arrangements of Osgoode Hall," and their regulations are still extant showing suitable arrangements made for the accommodation with rooms, bed and board (including wine for the Barristers only). The hall was much used by Barristers from out of town during term time when they came up on motions before the Court, and more by students.

In the meantime, July 2, 1831 (Trinity term, 1 and 2 Wm. 2), Convocation took away the necessity of a certificate from his master of the fitness of the candidate and for the first time an examination was ordered of all applying for admission to the books of the Society, which was to be "upon full and strict examination in open convocation by the Benchers present" as to "habits, character and education." The questions on the subjects prescribed in 1820 were put through the Treasurer or such of the Benchers as might be appointed. A candidate for call to the bar was examined in like manner. At the same time a somewhat curious provision was made that all members of the Society who had not taken a degree in it, (i. e., all Students-at-Law), should be formed into classes under the Presidency of a Barrister for the reading of essays, disputation of points of law either in the shape of cases or of questions, discussion of questions of general, constitutional and international law, stated examinations on standard authors, etc., etc. Each class was to meet at least eight times per year, and a report of the meetings was to be sent to the Treasurer of the Law Society. This made a kind of Students' Society and was perhaps intended to fill the place of the Advocate Society now defunct.

In June, 1832 (Trinity Term, 2 and 3 Wm. 4), a class to be called "The Trinity Class of Students of the Law Society of Upper Canada," was formed to meet at Osgoode Hall with much the same objects in view."

In November of the same year (Michaelmas Term, 3 Wm.

4), the students on their examination for admission were divided into three classes, Junior Class, Senior Class and Optimes. The Junior Class to be examined in the English and Latin languages, in mathematics and geography or history; the senior class in the English and Latin languages, geometry, algebra, moral philosophy, or the Greek language, astronomy and history; the optimes in the English, Latin and Greek languages, in geometry, algebra, moral philosophy, metaphysics, rhetoric and the Belles Lettres, geography, astronomy and history. No advantage was derived from the higher standing except that the grade was stated in the certificate of admission granted to the successful student.

The examination for call was "similar to that passed on admission and moreover * * * in the principles of the Law of England, in the science of special pleading, the law of evidence, the law relating to trials at Nisi Prius and the practice of the courts."

All this was of consequence in the case of Barristers, but Attorneys continued for some time to be admitted as before.

As has been mentioned, the section of the Act of 1797 in which three years on the books of the Society were required, was repealed in 1822 by 2 Geo. 4, c. 5, s. 3, so that thereafter the Law Society had no control over Articled Clerks as such. Of course by far the greater number of Articled Clerks were also Students-at-Law, and the Society had control over them in that capacity; but no examination could be prescribed for admission as attorney; that was for the Courts—and the Courts prescribed none.

While the Law Society made no arrangements for the education of students, it should be mentioned that the scheme for a Provincial University submitted to the Governor in 1826 provided for a Professor of Law and a course in Civil and Public Law. King's College was opened in 1843, and had on its staff a Professor of Law. In 1850 the college became the University of Toronto, and the lectures in law continued till 1853, when the chair was abolished¹⁵. The other universities

¹⁵The first Professor of Law was William Hume Blake, B. A. (T. C. D.) afterwards the Chancellor of Upper Canada, the father of the Hons. Edward and S. H. Blake. During his illness, his place was filled by Mr. (afterwards Chief Justice) Draper, and Mr. (afterwards Vice-Chancellor) Esten. On Blake resigning in 1848, he was succeeded by Skeffington O'Connor LL. D. (T. C. D.) who was afterwards (in 1863) a Justice of the Queen's Bench.

had and have Faculties of Law, but, as in the present system in the University of Toronto the lectures are of an academic nature, Constitutional Law, Federal Law, Roman Law and the like.

Such lectures were of little use to teach a lawyer his business and the want of any safeguard against a licensed practitioner being ignorant of his profession was a matter of common concern. As a legal writer says a little later (1855), 1 Can. L. J., O. S., at p. 163.

“Existing laws afford no guarantee of fitness. A young man whose only qualification for entering the study of the law is ability to read and write, may be articulated to an Attorney, spend five years copying and serving papers or idly kicking his heels against the office desk, or in doing the dirty work of a disreputable practitioner. At the end of that time, armed with a certificate of service, he claims to be sworn in as an attorney of Her Majesty’s Court, and is sworn in accordingly. He may know nothing whatever of professional duties, may in fact be grossly illiterate and deficient in every requirement that would enable him to act with safety and advantage for a client; and yet the law entitles him, simply on proof of service under articles, to the certificate enabling the holder to undertake the most important duties of an Attorney.”

An editorial in the following year, 1856, 2 Can. L. J., O. S., at p. 50, after pointing out the precaution taken to secure a learned Bar by an examination, preliminary and final, proceeds: “The Attorney is subject to no examination whatever, preliminary or final. The Barrister must have proved his fitness, the fitness of the attorney is presumed.”

The Legislature at length gave the Law Society jurisdiction over Attorneys as well as Barristers. In 1857, the Act 20 Vic. c. 63. (Can.) required the Law Society, before any person should be admitted as an attorney or Solicitor (the Court of Chancery had been instituted in 1837 and reorganized in 1849, and practitioners of that Court corresponding to Attorneys in the Common Law Courts were styled “Solicitors”—practically all Attorneys were Solicitors and vice versa), “to examine and enquire by such ways and means as they should think proper touching the fitness and capacity of such person

to act as an Attorney or Solicitor;” and then and not otherwise the Judges might, on production of the Law Society’s Certificate of fitness, admit the candidate as an Attorney and Solicitor; and this still is the law.

No Court can hear a Barrister who has not been called by the Society. No Court can admit a Solicitor without the certificate of the Society. The Society is the sole judge of the fitness and capacity of either, and the legal profession is master in its own house.

The Statute of 1857 required Articles of Clerkship to be filed in the office of the Clerk of the Crown and Pleas within three months of their execution; this prevented post-dating and fraud. Every Articled Clerk was required to attend the sittings of the Courts at Osgoode Hall during at least two terms under rules to be laid down by the Law Society¹⁶.

In August, 1859 (Trinity Term, 23 Vic), the rules were recast. Students-at-Law on their admission were classed: 1—University Class; 2—Senior Class and 3—Junior Class. The first class were graduates of a British University and were examined on one or more of the following books: Homer’s Iliad, Book 1; Lucian, Charon, Life or Dream of Lucian and Timon; Horace, Odes; Mathematics, Euclid, Bb. 1, 2, 3, 4, and 6, or Legendre’s Geometrie, Bb. 1, 2, 3 and 4, Hind’s Algebra; Metaphysics, Walker’s or Whately’s Logic, and Locke on the Human Understanding; Herschell’s Astronomy; Ancient and Modern History. For the Senior Class the books and subjects named for the University Class. For the Junior Class, Horace, Odes, Bb. 1 and 3; Mathematics, Euclid, Bb. 1, 2 and 3, or Legendre’s Geometrie by Davies, Bb. 1 and 3, with problems.

An applicant who, having his degree, passed the examination for the University Class could be called in three years instead of five. If he failed, unless rejected *in toto*, he dropped into the Junior Class as was the case with an applicant for the senior class. There was no other than sentimental advantage in passing for the senior rather than the junior

¹⁶This legislation, much needed and very valuable, was due in great measure to Hon Robert Baldwin, Treasurer, 1847 and 1850-1858.

class; the time was not shortened for a member of the senior class¹⁷.

Education was now provided for all those proposing to become Barristers. Every Student-at-Law was obliged to attend for four terms all the lectures given by the lecturers of the Society, two in number, in Law and Equity respectively¹⁸, who were also examiners for call.

On the examination for call, there were two classes, "Call" simply, and "Call with Honors." The former was examined on Blackstone's Commentaries, Bk. 1, Addison on Contracts, Smith's Mercantile Law, Williams on Real Property, Story's Equity Jurisprudence, Stephen on Pleading, Taylor on Evidence, Byles on Bills, Public Statutes relating to Upper Canada, Pleadings and other books and subjects as the Benchers or Examiners might prescribe¹⁹.

By this time the use of Osgoode Hall as a boarding house had come to an end, but still Articled Clerks were obliged by Statute to keep two terms. They did not take the lectures as Articled Clerks, but as Students-at-Law if they were such, just as Students-at-Law as such were no longer required to keep terms as such, but if Articled Clerks they must keep two terms as Articled Clerks. The Student-at-Law passed a preliminary examination, the Articled Clerk did not.

In the first Parliament of the Province of Ontario²⁰, by Statute (1868), 31 Vic. 23, it was provided that an Attorney or Solicitor must during the year next but two before his final examination pass an examination to the satisfaction of the

¹⁷Applicants were examined in the presence of a standing committee of the Benchers, but by the "Examiner for Matriculation." Mr. Hugh N. Gwynne, B. A. (T. C. D.) was appointed to this office; he had been from 1842 Secretary and Librarian.

¹⁸There had since 1855 been temporary lecturers appointed, but in March 1858 S. H. Strong (afterwards Hon. Sir. Henry Strong, Chief Justice of Canada) was permanently appointed Lecturer in Equity, and J. T. Anderson, Esq., in Law. See 4, Canada Law Journal O. S. 60. Strong was one of the ablest equity lawyers Canada ever produced. On the permanent establishment of the Osgoode Hall Law School, it was hoped for some time that he would become its first principal, but he finally declined the offer.

¹⁹The Examinations for admission was conducted orally by the "Examiner for Call" in the presence of a Committee of the Benchers. Those for Call and Certificate were first in writing under the supervision of the "Examiners for Call" and if 50% were taken by the Candidate he then went up for an oral examination by the Benchers in Convocation; if 50% were not taken, the Candidate failed.

The examinations were fairly stiff. Examples may be seen in (1860), 6 Can. L. J. O. S. 31, 78. Often a large percentage of those examined were refused certificates. At one examination as many as 14 out of 22 candidates, nearly 65%, failed.

²⁰What had been for many years the Province of Upper Canada became the Province of Ontario July 1, 1867, by the British American Act.

Law Society and another to its satisfaction not less than one year thereafter.

I do not stop to detail what was done under this Act as it merges into that next to be mentioned.

The state of affairs was improved somewhat, but not sufficiently. In 1872 the Law Society's petition to the Legislature to enable them to extend the advantages of legal education was acceded to, and a new Act passed, 35 Vic. c. 6. That enabled the Society to require that all Clerks thereafter to be articled should pass a preliminary examination, and that their term of service under their articles should not run until they had passed this examination. The Benchers also were empowered to make rules for the improvement of legal education, appoint readers and lecturers, require the attendance of Articled Clerks and Students-at-Law at reading and lectures and an examination thereon as a prerequisite to call to the bar or admission as an attorney, etc.²¹

The Benchers accordingly, June 7, 1872, laid down a curriculum for the preliminary examination of the Articled Clerks; Caesar's Commentaries, Bb. 5 and 6; Arithmetic; Euclid Bb. 1, 2 and 3; Outlines of Modern Geography; History of England (W. Douglas-Hamilton); English Grammar and Composition; Elements of Bookkeeping. The Students-at-Law passed an examination on Horace, Odes Bk. 3; Virgil's Aeneid, Bk. 6; Caesar's Commentaries, Bb. 5 and 6, Cicero, Pro Milone; Mathematics, Arithmetic, Euclid Bb. 1, 2 and 3, Algebra to end of Quadratic Equations; English History (W. Douglas-Hamilton); Outlines of Modern Geography, English Grammar and Composition. It will be seen that the curricula have much in common, Caesar, Arithmetic, Euclid, Geography, History of England, English Grammar and Composition. The Student-at-Law took also Horace, Virgil, Cicero,

²¹This Act was promoted by the Hon (afterwards Sir) Oliver Mowat, the Prime Minister, who had been a Vice Chancellor and took a great interest in the profession; but the matter had received long and careful consideration by the Benchers, culminating in a Report by the Committee on Legal Education, December 8, 1871 (Michaelmas Term, 35 Vic.). The Chairman of this Committee was Thomas Moss, afterwards Chief Justice of Ontario; and the Report recommended an application to Parliament. The Act of 1868 was generally known as Blake's Act from its author Hon. Edward Blake, Prime Minister of Ontario, Member of the House of Commons of Canada and afterwards Member of the Imperial House of Commons. He was long a Benchers and for some years Treasurer of the Law Society.

Algebra; the Articled Clerk, bookkeeping²². There was, however, a rule that no one admitted as a student at law need pass a preliminary examination as an Articled Clerk. Graduates in Arts of a British University were not subjected to any examination, and there was no longer to be any division into Senior and Junior classes.

A Law School was established with four lecturers: 1—General Jurisprudence, 2—Real Property, 3—Commercial and Criminal Law and 4—Equity; but attendance on the lectures was made voluntary. There was no building, the lectures were given at Osgoode Hall and were fairly well attended.

Every Student-at-Law before his final examination for Call was required to pass two intermediate examinations, the first in his third year, the second in his fourth. These corresponded to the two examinations prescribed for Articled Clerks by the Statute of 1868. The curriculum prescribed for each was the same, namely, for the first Intermediate, Williams' Real Property, Smith's Manual of Equity, Smith's Manual of Common Law, Act respecting the Court of Chancery, Consolidated Statutes of Upper Canada, chapters 12, 42 and 44. For the second Intermediate, Leith's Blackstone²³; Greenwood on Conveyancing (Chapters on Agreements, Sales, Purchases, Leases, Mortgages, Wills), Snell's Treatise on Equity, Broom's Common Law, Consolidated Statutes of Upper Canada, c. 8, Statute of Canada, 29 Vic. c. 28²⁴, Insolvent Act. Four scholarships of considerable value were established, one for students under one year's standing, one for those under two, one for those under three and one for those under four. The curricula were for the first, Stephen's Blackstone, vol. 1; Stephen on Pleading, Williams on Per-

²²These examinations were conducted by the "Examiner for Matriculation" Mr. Gwynne, before a Committee of Benchers appointed for that purpose and were partly *ore tenus*. Papers were prepared and printed in (1) Latin, (2) Mathematics, (3) History, Geography, English Grammar and Composition. If the candidate did not pass a satisfactory written examination he could not offer himself for the oral. All distinction of Senior and Junior Class was abolished.

²³This was an edition of that part of Blackstone's Commentaries which relates to Real Property. The Editor, Mr. Alexander Leith, Q. C. was a very distinguished Real Property lawyer in Toronto, and in this work he gave the law as modified by our legislation so as to adapt Blackstone to the circumstances of this Province; otherwise of course Blackstone would be very misleading. It has always been the policy of the Law Society to prescribe Ontario books where possible.

²⁴That is, the Statutory law of Property and Trusts in Upper Canada. Before the British America Act of 1867, the two Canadas had been for about a quarter of a century united in one Province of Canada.

sonal Property, Griffith's Institutes of Equity, Consol. Stat. U. C. cc. 12, 43. For the second, Williams on Real Property, Best on Evidence, Smith on Contracts, Snell's Treatise on Equity, the Registry Act²⁵. For the third, Real Property, Statutes relating to Ontario, Stephen's Blackstone, Book V, Byles on Bills, Broom's Legal Maxims, Story's Equity Jurisprudence, Fisher on Mortgages, vols. 1 and 2, chapters 10, 11 and 12. For the fourth, Smith's Real and Personal Property, Russell on Crimes, Common Law Pleading and Practice, Benjamin on Sales, Dart on Vendors and Purchasers, Lewis's Equity Pleading, Equity Pleading and Practice of this Province.

The Articled Clerk had a final Examination on Leith's Blackstone²³, Watkins on Conveyancing, Ninth Edition, Smith's Mercantile Law, Story's Equity Jurisprudence, Leake on Contracts, The Statute Law, The Pleading and Practice of the Courts. The Student-at-Law if he did not go in for honors, Blackstone, Volume 1, Leake on Contracts, Watkins on Conveyancing, Story's Equity Jurisprudence, Stephen on Pleading, Lewis's Equity Pleading, Dart on Vendor and Purchaser, Taylor on Evidence, Byles on Bills, The Statute Law, The Pleading and Practice of the Courts; and if he desired Honors, also Russell on Crimes, Broom's Legal Maxims, Lindley on Partnership, Fisher on Mortgages, Benjamin on Sales, Jarman on Wills, Von Savigny's Private International Law (Guthrie's Edition), Maine's Ancient Law. All final candidates might be and not infrequently were examined also on the Intermediate subjects.

The Law School thus established began its career in October, 1873²⁶, and very many students availed themselves of the

²⁵This is, the Statutory provision as to Registration of Titles to Real Estate.

²⁶The Staff was composed of Alexander Leith, President and Lecturer in Real Property; James Bethune, Lecturer in General Jurisprudence; Zebulon A. Lash, Lecturer in Commercial and Common Law, and Charles Moss, Lecturer in Equity. Mr. Leith was the well-known Real Estate Lawyer, editor of Blackstone, vol. 2. Mr. Bethune became one of the most prominent men at the Bar, a member of the Legislature, whose too early death was much lamented. Mr. Lash (now K. C.) was afterward Deputy Minister of Justice of the Dominion, but returned to active practice and still adorns the Bar. Mr. Moss was afterwards Chief Justice of Ontario.

In December, 1874, Mr. Bethune resigned and was succeeded by William Mulock (now Sir William Mulock, Chief Justice of the Exchequer Division).

In May, 1876 (Trinity Term), the term of engagement for Lecturers was made one, two, three and four years respectively, and they were made ineligible for re-appointment. Mr. Moss was elected for one year and made President, lecturing on Common and Commercial Law; Mr. Mulock for two, lecturing on Equity; Mr. John S. Ewart (now K. C.) for three years, lecturing on Real Property, and T. D. Delamere (afterwards K. C., now deceased), for four years, lecturing on Criminal Law and Law of Torts. After the abolition of the Law School, Mr. Ewart for some time gave a weekly lecture on Chancery practice and Mr. Delamere on Common Law Practice.

opportunities thus given for a legal education. Students who would otherwise have served their term in the country were attracted to Toronto. It became a matter of complaint of the country practitioners that they were deprived of their clerks—particularly so as the term of service was reduced by attendance on lectures and passing the law school examinations. A student could reduce his term by from six to eighteen months by this means. One requires no imagination to conceive the very great inducement this was to a capable and ambitious student.

Finally by a vote of 8 to 4, Convocation determined, November 24, 1877, Michaelmas Term, to abolish the Law School from and after the last day of the succeeding Easter Term, June, 1878.

This step was the subject of much discussion in the profession and in the press, legal and lay. All kinds of opinion were expressed as to the means, but most agreed as to the propriety of some form of education being provided for. It had been proposed that the Law School should be affiliated with the University of Toronto, but that course had not recommended itself to Convocation; a law college was suggested by some. In May, 1881, the formation of associations like the Osgoode Legal and Literary Society throughout the Province was recommended, with a sufficient number of students to ensure a good attendance and of Barristers disposed to deliver lectures. It was recognized that the Law Society would not create or direct these societies, but could only recommend. Some such were formed, but did not last long nor were they very useful while they did last.

Petitions came in from students in large numbers; and in Michaelmas Term of 1881, the Society re-established the law School for a period of two years to begin December 12, 1881, with four lectures the senior of whom was to be chairman, attendance still to be voluntary²⁷. In view of the many petitions for the re-establishment of the school, the attendance

²⁷The Lecturers appointed were Thomas Hodgins, Q. C. (afterwards Master-in-Ordinary of the Supreme Court of Judicature for Ontario), Chairman and Lecturer on Constitutional Law, etc. Thomas D. Delamere, already mentioned, who lectured on Pleading and Practice, Joseph E. McDougall (afterwards Q. C. and Judge of the County Court of the County of York) and E. Douglas Armour (afterwards K. C.), author of several works on Real Property.

was very disappointing, but it was decided to try the experiment till the end of the two-year term.

In June, 1883, the school was continued till the early Easter Term, 1884²⁸. A proposition to establish law schools outside of Toronto failed. In Easter Term, 1884, the school was continued until the last day of Easter Term, 1886. In 1887 the project of establishing a teaching faculty in the University of Toronto was taken up by a committee of the Benchers with the Senate of the University, and an elaborate scheme was drawn up. This was vigorously criticised not only in convocation, but out of it, especially by those interested in other universities²⁹. The committee was reappointed with additional members and directed to take the question up with all the universities in the Province; they did so, but in the long run without success³⁰.

January 4, 1889, it was decided "to continue and reorganize the school and to appoint a President³¹, who should have supervision and general direction of the school," not less than two lecturers and two examiners—the lecturers theretofore having been also examiners. Attendance was made compulsory for the first time. All Students-at-Law and Articled Clerks were required to take the second and third years of the school course. If they resided in Toronto during the last three years they must attend the full three years' course. A small fee was imposed, by no means enough to pay for the support of the school.

Lectures had been given in Osgoode Hall, but for a long

²⁸The Lecturers were Messrs Delamere and Armour already named. W. A. Reeve (afterwards Principal and a Q. C.) and Alfred H. Marsh (afterwards Q. C.).

²⁹The scheme will be found printed at length in 24 Can. L. J. N. S. pp. 130 sqq. See one criticism at pp. 151-153 of the same volume; another pp. 182-173.

³⁰The report is printed in 24 Can. L. J. N. S. at pp. 393-397; another will be found in 25 Can. L. J. N. S. 51.

³¹It had been hoped to secure Mr. Justice Strong of the Supreme Court of Canada for this position, but he declined, and, July 3, 1889, W. A. Reeve, Q. C., was appointed Principal.

The new Principal was instructed to visit the Law Schools in New York, Massachusetts and such other places as might be thought advisable, with Messrs. E. Martin, Q. C., and Charles Moss, Q. C., to acquire information on the Law School systems in vogue. He did so, and reported, Sept. 3, 1889, to Convocation, and the School was formally opened, October 7, 1889. The Lecturers were Messrs Marsh and Armour; the Examiners were Mr. P. H. Drayton (afterwards Official Arbitrator) and Mr. R. E. Kingsford (afterwards Police Magistrate, Toronto).

When in Easter Term, 1890, the number of lecturers was increased to four, Messrs Drayton and Kingsford were appointed Lecturers and Messrs F. J. Joseph and Aytoun-Finlay and Malcolm Cameron, Examiners.

time the proposition had been under consideration to erect a building especially for a Law School. Tenders had been obtained as early as December, 1880, but the matter dragged. It was taken up in earnest in the fall of 1889, plans were obtained and building proceeded with in 1891 and was ready in 1892.

The society in 1889 dropped their preliminary examination, the last to be Hilary Term, 1890. Thereafter the examination of the University was accepted instead, and now a degree of Arts or Law of a British University or Graduation Diploma of the Royal Military College, the examination of a university on prescribed subjects, or a matriculation certificate, a certificate of the further examination at the R. M. C. is sufficient, and one of them is required.

I shall not trace the trifling changes which have been made in the curriculum of the Law School; but here set out the present³².

SUBJECTS OF STUDY.

III.

FIRST YEAR.

GENERAL JURISPRUDENCE.

Holland's Elements of Jurisprudence.

CONTRACTS.

Anson on Contracts.

REAL PROPERTY.

Williams on Real Property, except Parts III and VII.
The Land Titles Act.

COMMON LAW.

Odger's Common Law.

³²The present Staff is as follows:

FACULTY.

Principal:—Newman Wright Hoyles, B. A., LL. D., K. C.

Lecturers:—John King, M. A., K. C., John Delatre Falconbridge, M. A., LL. B., John Shirley Dennison, K. C., Samuel Hugh Bradford, B. A., K. C.

Demonstrators:—Christopher Charles Robinson, B. A.; Harold William Alexander Foster, LL. B.

Examiners:—Archibald Douglas Armour, M. A. Senior Examiner, Nell Douglas McLean, B. A., Patrick Kerwin, George Franklin McFarlane, LL. B., John Alexander Soule, LL. B.

CONSTITUTIONAL HISTORY AND LAW.

Bourinot's Manual of the Constitutional History of Canada. Todd's Parliamentary Government in the British Colonies (second edition 1894). The following portions, viz:

Chapter 2, pages 25 to 63 inclusive.

Chapter 3, pages 73 to 83 inclusive.

Chapter 4, pages 107 to 128 inclusive.

Chapter 5, pages 155 to 184 inclusive.

Chapter 6, pages 200 to 208 inclusive.

Chapter 7, pages 209 to 246 inclusive.

Chapter 8, pages 247 to 300 inclusive.

Chapter 9 pages 301 to 312 inclusive.

EQUITY.

Maitland's Lectures in Equity.

PRACTICE AND PROCEDURE.

Judicature Act and Rules of Practice.

STATUTE LAW.

Such Acts and parts of Acts as shall be prescribed by the Principal.

SECOND YEAR.

CRIMINAL LAW.

The Criminal Statutes of Canada.

REAL PROPERTY.

Kerr's Student's Blackstone, Book 2. Armour's Real Property.

PERSONAL PROPERTY.

Williams on Personal Property.

CONTRACTS.

Pollock on Contracts.

Rawlins on Specific Performance.

Pollock on Partnership.

TORTS.

Underhill on Torts.

EQUITY.

H. A. Smith's Principals of Equity.

Underhill on Trusts.

EVIDENCE.

Powell on Evidence.

CONSTITUTIONAL LAW.

Lefroy's Canada's Federal System.

PRACTICE AND PROCEDURE.

Statutes, Rules and Orders relating to the jurisdiction, pleadings, practice and procedure of the Supreme Court of Canada, the Exchequer Court and the Courts of Ontario.

STATUTE LAW.

Such Acts and parts of Acts as shall be prescribed by the Principal.

EQUITY.

Underhill on Trusts, 1914-15, De Colyar on Guarantees.
Bell and Dunn on Mortgages, 1915-16, De Colyar on Guarantees.

TORTS.

Pollock on Torts.
Smith on Negligence, 2nd édition.

EVIDENCE.

Best on Evidence.

COMMERCIAL LAW.

Chalmers on Sales.
Maclaren on Bills, Notes and Cheques.

PRIVATE INTERNATIONAL LAW.

Foote's Private International Jurisprudence.

CONSTRUCTION AND OPERATION OF STATUTES.

Hardeastle's Construction and Effects of Statutory Law.

PRACTICE AND PROCEDURE.

Statutes, Rules and Orders relating to the jurisdiction, pleadings, practice and procedure of the Supreme Court of Canada, the Exchequer Court and the Courts of Ontario.

COMPANY LAW.

The Ontario Companies Act and Amendments. The Companies Act, R. S. C. Chap. 79, and amendments. The Winding-up Act, R. S. C. Chap. 144, and amendments. Palmer's Company Law.

MUNICIPAL LAW.

The Municipal Act.

STATUTE LAW.

Such Acts and parts of Acts as shall be prescribed by the Principal.

NOTE.—In the examination of all the years, students are subject to be examined upon the *matter of the lectures* of those years respectively, as well as upon the text books and other work prescribed.

Any person who desires to qualify for the practice of the law as a Barrister and Solicitor in Ontario, and who does not come under the rules in special cases, is required:

1—To be admitted into the Society as a Student-at-Law.

2—To serve a practising Solicitor as his clerk for the prescribed period.

3—To attend lectures at the Law School for three years.

4—To pass the prescribed examinations.

5—To pay the prescribed fees.

(If he does not wish to be admitted as a solicitor he need not serve under Articles at all, but must attend a Barrister's Chambers for the same time. This is in practice never done now).

The time of service for a graduate is three years; for a non-graduate five; fee for admission to the Society is \$51, school fees per term \$100, for call to the bar \$100 and for admission as Solicitor \$60. The title "attorney" has not been in use since 1881, all members of that branch of the profession are now called solicitor³³.

³³I have gone thus particularly into the history of the Law Society to show the variations from time to time of public opinion and the experiments which have been tried. Let me tabulate.

BARRISTERS.

1792 Adoption of French Canadian System, all for five years under articles, examined before the Court and called both as Advocates and Attorneys.

1797 Must be five years on Books of Law Society and the same time in Barrister's Chambers. No examination. The five years requirement, except in special cases, still continues.

1818 Examination for admission to the Society on one of Cicero's orations, etc., before the Benchers.

1822

ATTORNEYS (OR SOLICITORS).

Must have been under Articles five years, and three years on Books of the Society. No examination. The five years requirement, except in special cases, still continues.

Attorneys, no longer members of the Law Society. No examination required at any time.

1825 Examination on Latin Prose and Poetical Authors, and in the Mathematics before the Benchers.

1828 Students must keep four Terms in Court.

1831 Formed classes for educative purposes.

1832 And especially one at Osgoode Hall.

1857

Must attend two terms in Court and be examined and certified by the Law Society.

It will be seen that the Legislature has ultimately placed in the hands of the profession not only the regulation but also the education of practitioners of all kinds. This has proved so beneficial that the like provisions have been extended to the professions of Medicine, Dentistry, Pharmacy (the Medical Council indeed does not educate owing to the existence of our efficient established Medical Colleges). There is no fear of the standard being debased; no advantage is derived by the profession from graduation of a large class, i. e. the admission of a great number to the Bar who will be competitors of those already practising, and any attempt to make the standard too high would be restrained by a wholesome regard for public opinion. It must however be said that though it has twice happened in the history of the Province (in 1794 and 1804), that the Legislature thought there were not enough lawyers, it is hard to conceive of our community (or perhaps any other) ever thinking that again.

It will be seen that we have tried all the methods of education that can be suggested. We have had the student left to the teaching of a master, for long the method in England. We have had the students directed to band themselves together in Classes for mutual benefit and with lectures from Barristers. We have obliged them to attend terms of Court. We have tried to make satisfactory arrangements with the Universities. All these have proved wholly insufficient, and in the long run the lawyers of Ontario have put their hands into their own pockets, erected a Law School building, engaged and paid lecturers and examiners and have determined to educate the young men to become competitors of themselves; and this they did for a long time at an annual loss of a considerable amount. That I think can fairly be called altruism if it is also *esprit de corps*.

We should have been much better satisfied if the Universities or one of them had established a real and practical Faculty of Law with a curriculum satisfactory to us; but we should always have insisted on conducting the examinations for Call and Admission ourselves just as is done in Medicine,

Dentistry, Pharmacy, etc. The reasons for this are apparent and need not be specified.

We have found, too, that the same curriculum should be prescribed for all lawyers whether Barristers or Solicitors, just as the same curriculum is prescribed by the Medical Council for all doctors whether surgeons or physicians.

The control of the Law Society over practitioners is complete and it is exercised without flinching though judicially. The accused has notice of the charge against him and is summoned to attend the hearing of evidence. He may cross-examine by self or counsel, give his own or (and) other evidence and in all respects has the right of an ordinary litigant.

Very early indeed one member was disbarred, and there has never been any hesitation to exercise the wholesome jurisdiction.

We have continued the distinction of Barrister and Solicitor. Although all but a very few have from the beginning been both Barrister and Solicitor that has not been universal³⁴, moreover a few who have been admitted as solicitor have ceased to take out the annual license to practise as such; about 4% are in that case, a rather smaller percentage have never been called. At one time when the curriculum and prerequisites were different from the two branches of the profession, the omission to qualify for both was not unnatural or uncommon; but now the curriculum is exactly the same, and it may be confidently expected that this will be even less common. The Articled Clerk serving in the office of a solicitor

³⁴There was a time about fifty years ago when some attorneys seemed to think they were entitled to act as Counsel in the County Courts and with the usual costume of the Barrister: (See 2 Can. L. J. N. S. p. 253) but this was soon checked.

The Barrister is clothed in black with white linen and necktie (or bands), and a black gown. If he is a King's Counsel his costume is of a peculiar cut corresponding to the usual costume of a gentlemen in Queen Anne's time, his gown is also of a peculiar cut and made of silk; the Utter Barrister, i. e., one not a K. C., wears black clothes of any seemly cut and a "Barrister's Gown" of stuff.

In the day when cloth bags were commonly carried—say thirty years ago—the Attorney carried one of black colour as did the student; the Barrister's was blue, the Queen's (King's) Counsel's red, and the Judge's green. These are still occasionally seen, and it would be as grave a breach of decorum for one to carry the bag of another grade as for a corporal to carry a colonel's insignia or vice versa. Most, however, of all grades now carry a black leather bag, the "brief-bag" as it is called.

Since 1857 the branches of the profession have been gradually assimilated, and the courses of study continually extended until the present time when the courses are identical and reasonably difficult.

The first and second Attorneys General, being English Barristers, did not sign the Attorney's Roll, and a few others from the mother-land were in the same condition. In the first twenty-five years of the Law Society only 3 out of 64 Attorneys did not become Barristers,—less than 5%. The proportion increased after the Act of 1822, so that by the time the Act of 1837 was passed, the percentage was nearly 30%. This tendency was checked by the Act of 1857, and now the percentage is negligible.

is at the same time attending the Chambers of the Barrister.

This apparent anomaly is only apparent and not real. Just as in the sister profession of medicine practically every one on this continent is educated in both medicine and surgery, and many become not only M. D. but also C. M.; they are both physicians and surgeons and all have the same curriculum and examination. This is not so in England. The Royal College of Physicians and the Royal College of Surgeons are not the same; just as there the Barrister is not a Solicitor or the Solicitor a Barrister.

Nevertheless it is recognized on this Continent as well that the office of the Surgeon is not the same as that of the Physician although the dividing line may often be uncertain. And so, no matter what the name, the office of the Solicitor is not the same as that of the Barrister, although the dividing line is often uncertain. In Ontario many doctors devote themselves mainly or wholly to surgery and do not meddle with medicine although wholly qualified and licensed as Physicians and so some Lawyers devote themselves mainly or wholly to "Counsel Work" the function of the Barrister. This has been found to be of very great advantage as he who devotes himself to surgery acquires a skill and dexterity to which the ordinary "General Practitioner" cannot attain, so he who devotes himself to conducting cases in Trial and Appellate Courts attains skill and dexterity beyond that of the ordinary lawyer. This is of as much advantage to the litigant as that to the patient; and of as much advantage to the Solicitor whose client has been taken in hand by the Counsel, as that of the general practitioner whose patient has been taken in hand by the Specialist. It must not be forgotten that a trial is a "major operation" desiderating skill and experience at the best of times and with the best of judges.

As a consequence, while practically every lawyer is licensed to conduct his own cases at the trial and in appeal, in a large percentage of cases one of those who are known to devote themselves largely to Counsel work is employed on those occasions. Generally the solicitor himself will take part as Junior Counsel in his capacity as Barrister. There is noth-

ing in the way of *esprit de corps*, custom, public opinion, etc., to prevent the solicitor taking his own brief—and many do so—any more than a physician is prevented from operating on his own patient—and many do.

In some cases the client himself insists on counsel being employed, just as some patients and their friends insist on a specialist surgeon. The only objection I ever heard to this custom is the fear expressed that the Counsel will steal the client. The very expression of such a fear indicates an extraordinarily low state of morals in the profession where such a fear can be more than the merest illusion. Any one who would steal a client would steal a sheep if it suited his purpose; and there is in our system about as little chance of the one as of the other. I have never heard it so much as suggested that any Counsel ever stole a client and I cannot think that such a thing could ever take place.

The Brief is brought or sent to Counsel by the solicitor himself. If the client brings it, he must bring either the solicitor or a letter from him. The client cannot in the first instance be so much as seen without the solicitor's consent, and the solicitor is always kept informed of everything that is being done with or for his client. The client is sent back to the solicitor; no Counsel would directly or indirectly accept as a client of his own, one sent to him by a solicitor. If any counsel were even to come under suspicion of such improper dealings, his practice would dwindle to the vanishing point. If it were proved against him he should be suspended or disbarred.

Counsel make their money by taking cases for others; prudent regard for their own pockets (if no higher reason) would keep them from "filching and stealing."

No one would, if he had to frame a system for the profession *de novo et ab origine*, think of making a formal distinction between barrister and solicitor, but we are an essentially practical people; we care nothing for logical consistency; if we find an institution work reasonably well in practice we do not discard it because it seems anomalous in theory. We would never think of applying to the Legislature to make the

distinction if none existed but we find it come down to us from the past as an existing institution and we find it does no harm, and accordingly we retain it.

But whatever the form, there must always be in fact a marked distinction in function. There must always be in fact abilities, acquirements which tend to enhance proficiency in one or the other capacity, and often the acquirements or abilities most useful in one are not so but perhaps rather the reverse in the other. On that I need not enlarge, but content myself with saying that nothing but good can be the result of a specialization as Counsel of a sufficient number of lawyers whose talents lie in that direction, and the liberal employment of these by practitioners less well qualified in that regard.

In conclusion permit me to say how glad I am to meet the Society, to wish it a long, prosperous and useful career and to add that I shall most gladly do all that is in my power to further its objects and enhance its usefulness.

WILLIAM RENWICK RIDDELL.

\$2.00 PER ANNUM 35¢ PER COPY

The Canadian Journal of Medicine and Surgery

145 COLLEGE ST.

TORONTO, ONT.

VOL. XXX

TORONTO, SEPTEMBER, 1911

NO 3

Contents

ORIGINAL CONTRIBUTIONS.

- The Medical Profession in Ontario. A
Legal and Historical Sketch. By
the Honourable William Renwick
Riddell, L.H.D., etc. 131
- "B.A., M.B.," or only "M.B." By John
Hunter, M.B., Toronto. 154

EDITORIALS.

- Our Illustrated Number 164
- The Dietetics of Cardiopaths 166
- The Annual Meeting of the Ontario
Medical Council 172
- Debatable Points in Dr J. B. Murphy's
Presidential Address 178

See P. Blakiston's Son & Co.'s Advertisements, Pages xl. and xli.



*It is team work that brings results—
hence, in*
Hemaboloids
ARSENIATED
(with Strychnia)

*it is the synergistic efficiency of the combined
Iron, Arsenic, Strychnia, Predigested Protein,
Bone Marrow Ext. and Nuclein, in absorbable
and assimilable form that makes it sup-
erior to any or all of these agents given
alone or in ordinary mixture.*

*The Palisade Mfg. Co.
Yonkers, N. Y.*

Chloroform



FAC-SIMILE
OF
LABEL NOW
IN
USE.



CHLOROFORM

**DUNCAN'S PURE
S.G. 1490.**

PREPARED ENTIRELY FROM
BRITISH ETHYLIC ALCOHOL

BY
DUNCAN, FLOCKHART & Co.,
EDINBURGH & LONDON.

NOTE.—This, which
is prepared entirely
from British Ethylic
Alcohol, is the only
Chloroform which we
supply as

Duncan's Pure,
S.G. 1490.

—
*To be kept Cool, and not
exposed to a Strong Light.*

—
POISON.

PRACTICALLY NON-DECOMPOSABLE under any circumstances

N.B.—We can only guarantee Chloroform to be of our manufacture when it is supplied in bottles bearing our label, and having the stoppers sealed with one of our trade mark stamps.

Our Chloroform is put up in 2 oz., 1-4, 1-2, 1, 2, 4 and 7 lb. Bottles, and may be ordered through any Wholesale Drug House in Canada.

DUNCAN, FLOCKHART & CO.,

Physicians should avoid substitution
by prescribing original packages

Manufacturing Chemists,
EDINBURGH, SCOTLAND

Duncan, Flockhart & Co.'s Capsules **GLYCEROPHOSPHATES** of the (No 324)

Each Capsule contains

Calcium Glycerophosphate $\frac{1}{2}$ grain

Sodium Glycerophosphate $\frac{1}{2}$ grain

Potassium Glycerophosphate $\frac{1}{2}$ grain

Manganese Glycerophosphate $\frac{1}{2}$ grain

Iron Glycerophosphate $\frac{1}{2}$ grain

Caffein Glycerophosphate $\frac{1}{2}$ grain

Above formula is equal to a half-drachm dose of Duncan's Comp. Syrup of the Glycerophosphates.

These salts are in enormous demand for all cases of debility which require a course of phosphates. The Caffein Glycerophosphate is an extremely useful adjuvant in preventing nausea and stimulating action of the heart. One or two capsules are ordinarily prescribed to be taken thrice daily—after meals.

For Sale by all Retail Druggists.

Sample sent on application.

R. L. GIBSON

88 Wellington Street West

TORONTO

The Canadian Journal of Medicine and Surgery

A Journal published monthly in the interests of
Medicine and Surgery

Vol. XXX

TORONTO, SEPTEMBER, 1911

No. 3

❧ Original Contributions ❧

THE MEDICAL PROFESSION IN ONTARIO. A LEGAL AND HISTORICAL SKETCH*

BY THE HONOURABLE WILLIAM RENWICK RIDDELL, L.H.D., ETC.,
Justice, King's Bench Division, High Court of Justice, Ontario.

The history from a legal point of view of the medical profession in our Province is interesting both to physician and to lawyer. I have in some instances gone to the original sources, but make no pretence to originality: much of what I write has been said before by others (particularly by Dr. Canniff), and some by myself.

Our Province began its independent career as a separate Colony in 1792, having theretofore from 1763 been part of the Province of Quebec, which included a vast territory composed of what is now Quebec and Ontario and also the whole hinterland of the English colonies down to the mouth of the Mississippi.

Full legislative power was given to Upper Canada by the Constitutional Act, 31 George 3, C. 31, which separated the Province from the rest of British America.

At the time of this separation of our Province and for some time thereafter, there was no regulation as to who should practice medicine, or "physic," as it was called. Many of the practitioners were old army or navy surgeons, some were importa-

*Prepared for the Ontario Medical Association meeting, May 31, 1911.

tions from the United States, but most of those who treated disease were mere empirics. There had, indeed, been an Act or Ordinance passed by the Council of the old Province of Quebec in 1788, forbidding anyone to practise without a license from the Governor, which license was to be granted without an examination to all graduates of any British university and to all surgeons of the army or navy—but this was largely a dead letter in the newer parts of the colony, as our country was at that time.

In 1795, the Provincial Parliament of Upper Canada passed an Act, 35 Geo. III., c. 1, forbidding the sale of medicine, prescribing for the sick and the practice of physic, surgery or midwifery by anyone who had not been licensed. The Governor was to appoint a board to examine all who should apply for a license, and those approved of by them upon the examination were to be granted a license—the fee being £2 currency, *i.e.*, \$8. A penalty of £10, *i.e.*, \$40, was imposed for selling medicines, prescribing for the sick or practising physic, surgery or midwifery without a license. An exception was made for surgeons or surgeons' mates in the army or navy, and for those who had been practising at the time of the passing of the Act of 1791—these however, were not to take apprentices or students. There is no record of anything ever having been done under these provisions; the Act was found unworkable, and it was accordingly repealed in 1806 by 46 Geo. III., c. 2, and the profession was again much at large, although the Act of 1788 already spoken of was still nominally in force. Much public dissatisfaction was the result, and at length a new Act was passed in 1815, 55 Geo. III., c. 10, which forbade prescribing for the sick or the practice of physic, surgery or midwifery without a license—saving the case of graduates of a university in British Dominions, surgeons and surgeons' mates in the British army or navy and those who had practised before 1791. The prohibition against these taking apprentices or students was not repeated in this Act, nor was the prohibition against selling, etc., medicines. And it was expressly provided that women might practise midwifery without a license. The Governor was to appoint an examining and licensing Board.

Nothing seems to have been done under this Act either; and it was repealed in 1818 by 59 George III., c. 13, which, however, contained much the same provisions. A board of five was to be



A CLINIC BY PROFESSOR AGNEW.

appointed to hear and examine all persons who desired to practise physic, surgery and midwifery, or either of them, and, if satisfied, certify the same to the Governor, who would, if satisfied of the loyalty, integrity and good morals of the applicant, grant a license. But women were still to be allowed to practise midwifery without a license, and graduates of a British university and army and navy surgeons and surgeons' mates were still favoured. The Governor's Private Secretary was to receive 20 shillings—\$4, for each license.

A slight amendment was made in 1819 by 59 Geo. III., c. 2, whereby each applicant was to pay 10 shillings to the Secretary of the Board.

The first meeting of the Board took place January 4th, 1819, Messrs. James Macauley, Christopher Widmer, William Lyons and Grant Powell, surgeons, being present; and the next day, John Gilchrist, of my own old Township of Hamilton, was examined and received a license to practice physic, surgery and midwifery. This gentleman was one of a well-known family of physicians, and was known in Cobourg and vicinity as "Dr. John." This Board, with a short interruption, continued to sit (with, of course, from time to time changes in personnel) until 1865. They examined with some rigor and granted certificates, sometimes for one, sometimes for two and sometimes for all three branches of the profession. Of those rejected, instances are to be found of many deficient in Latin and classical knowledge, several with a diploma from the Faculty of Physicians and Surgeons of Glasgow (one of whom was "quite ignorant of chemistry and pharmacy"), one with a diploma from the Apothecaries' Hall, one who had served five years' apprenticeship to an army surgeon, etc. It is quite plain that the examination was no mere formality.

In 1827, by 8 George IV., c. 3, the Act was amended and new provisions introduced—all those holding a license or diploma from a British university, or from the Royal College of Physicians or of Surgeons, London, or a commission or warrant as physician or surgeon in the British army or navy, were entitled to a license without examination; also those residing in Upper Canada before the war of 1812 who remained in the Province during that war and produced a certificate of their



THE SHIP'S COCKPIT.

competency from three or more licensed practitioners. Practising without a license was made a misdemeanor.

In 1839, by 2 Vic., c. 38, all previous legislation was repealed, and those who had been members of the Board under the previous Acts were formed into a corporation to be known as "The College of Physicians and Surgeons of Upper Canada," of which the members were to be Fellows: all other persons then or thereafter authorized to practise physic, surgery and midwifery were to be Members of the College—and the College was to license. Provision was made that women might practise midwifery and that all with a diploma or license from any British university or from any College or Faculty of Physicians or of Surgeons in the United Kingdom, and also all army and navy surgeons, should receive a license, etc., etc.

The Fellows met from time to time, but owing to the efforts of the Royal College of Surgeons, London, the Act was disallowed by the Home authorities in 1840: and the former Act came into force again.

A new Board was commissioned by the Governor (Lord Sydenham): and examining and licensing went on as before.

In 1841, by 4 and 5 Vic., c. 41, it was provided that any person who was or should be licensed or authorized as a physician or surgeon, or both, either in Upper Canada or in Lower Canada, should be authorized to practise also in the other province.

In 1859, the statute 22 Vic., c. 47, recognizes for the first time homeopathy as a lawful system of medicine—five gentlemen (among them Dr. John Hall of Toronto) were appointed a Board to examine according to the doctrines and teachings of homeopathy—they issued a certificate upon which the Governor granted a license as in the case of practitioners of the regular school.

The Acts were consolidated in 1859, *Con. Stat. U. C.*, cc. 40, 41.

The Thompsonian or Botanic School, which was founded by Samuel Thompson in the '30's, and which had in the course of evolution become the Eclectic School, received legislative recognition a little later. In 1861, 24 Vic., c. 110, a Board of seven gentlemen (amongst them my own old preceptor, Richard Hare



A CLINIC BY PROFESSOR CHARCOT.

Clarke, M.D., of Cobourg) was formed to examine according to the doctrines and teachings of Eclectics. They were to certify, and the Governor to license, as in the case of the homeopaths.

All these Boards were abolished in 1865 by Act, 29 Vic., c. 34, which formed a "General Council of Medical Education and Registration of Upper Canada," composed of one representative from each of the colleges authorized to grant medical degrees—the University of Toronto, of Queen's College, of Victoria College and of Trinity College, and the Toronto School of Medicine, and also twelve elected by the profession. After the 1st of May, 1866, every practitioner was to be registered under this new Act—those entitled to registration were those formerly licensed in Upper or Lower Canada those certified from the four Upper Canadian universities or any university in British Dominions, those having a diploma of the R. C. Surg., L., or R. C. Phys., L., registered under the Imperial Medical Act or commissioned as physician or surgeon in the British army or navy. The Council might fix the matriculation standard, and also the curriculum to be observed by the medical colleges.

This made the medical profession of all schools into one body in law.

An amending Act was passed the following year, 1866, 29 & 30 Vic., c. 54, chiefly affecting matriculation and the standard of medical studies.

Upper Canada ceased to exist and Ontario was born, 1st of July, 1867—less than two years thereafter the law was again changed: 32 Vic., c. 45, incorporated the profession into "The College of Physicians and Surgeons of Ontario," formed a Council composed of one representative each from the University of Toronto, Queen's University, University of Victoria College, University of Trinity College, Royal College of Physicians and Surgeons (Kingston) and Toronto School of Medicine: twelve representatives to be elected by the Regular School, five by the Homeopaths and five by the Eclectics. A Register was provided for; and all those actually practising before 1st January, 1850, and all those already registered, etc., were to be placed upon the Register; but for all future aspirants, a Board of Examiners was provided, to be elected by the Council, one from each teaching body and nine from other members of the College; and



EDWARD JENNER

1749 - 1825

THE PRACTICE
OF
VACCINATION
FOR
THE FIRST TIME

THE FIRST VACCINATION.

neither Homeopath nor Eclectic was to be examined in *Materia Medica*, *Therapeutics*, *Theory* or *Practice of Medicine* or in *Surgery* or *Midwifery* (except the operative practical parts thereof) by any but those approved by the representatives on the Council of his School of Medicine. The curriculum, etc., was fixed by the Council.

The repealing Act of 1874, 37 Vic., c. 30, re-enacted most of the provisions of the former Act of 1869, without substantial change—a provision is made for Homeopathic students attending Colleges in the United States or Europe, and the five Eclectic members of the Board were to continue such for five years, but to have no successors.

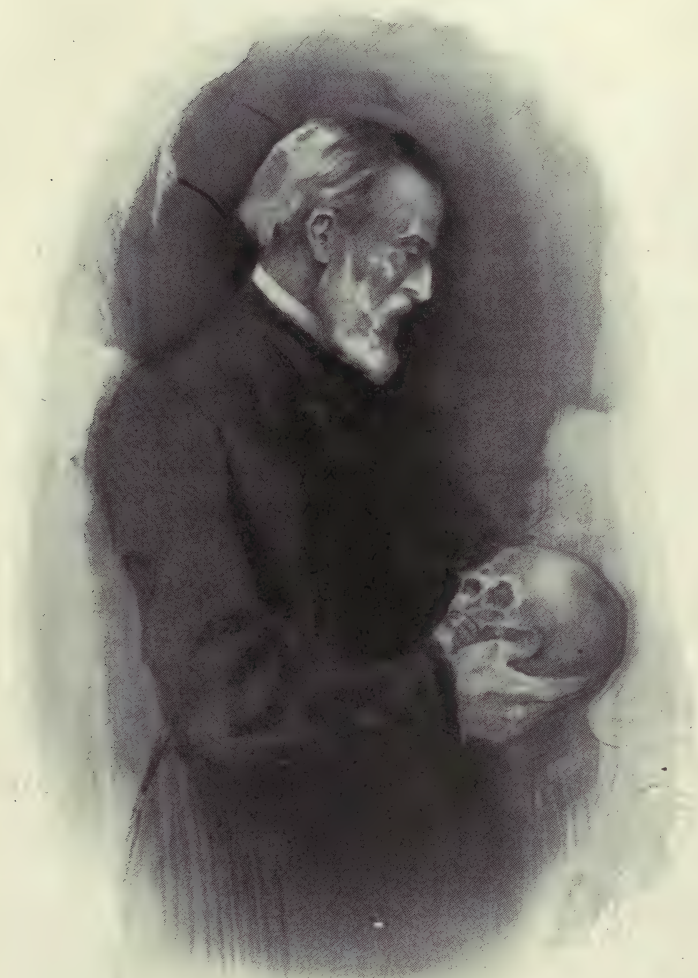
The Act of 1887, 50 Vic., c. 24, changes the Council—one member each is to be chosen by the University of Toronto, Queen's University, University of Victoria College, University of Trinity College, the Royal College of Physicians and Surgeons (Kingston), the Toronto School of Medicine, Trinity Medical School, the Ottawa University, Regiopolis College and the Western University.

But while in the Act of 1874, the Council had power to refuse to register or remove from the register only those who had been convicted of felony, by this Act this power is given in cases in which the accused has been convicted either in Her Majesty's Dominions or elsewhere of an offence which if committed in Canada would be a felony or misdemeanor, or has been guilty of any infamous or disgraceful conduct in a professional respect. This provision has been considered by the courts on a recent occasion.

The provisions of the Act of 1891, 54 Vic., c. 26, are of no great importance: that of 1893, 56 Vic., c. 27, increased the representation of the regular profession to 17 members, and reduced the term from five years to four.

By the Act of 1895, 58 Vic., c. 28, the power of fixing tariffs was taken away from the Division Associations.

The number of representatives was increased from 17 to 18 by the Act of 1910, 10 Edw. VII., c. 77, which also excused the Council from the duty of making enquiry when any Court of Record in the Province had decided that any practitioner had committed a criminal offence in connection with his profession—



A PORTRAIT OF KOCH.

upon receipt of proof of such decision, the Registrar was immediately to erase his name from the Register.

EDUCATION AND MEDICAL SCHOOLS.

In early days there were no medical colleges or schools in Upper Canada. Apprentices and students were received by practitioners; and those desiring to attend medical lectures were compelled to go to McGill, or to the United States or the mother country. What became the medical faculty of McGill seems to have been founded as a private enterprise in 1823 or 1824, and it became a College of McGill University in 1828.

Of those submitting themselves for examination by the Medical Board of Upper Canada, some produced diplomas from the College of Physicians and Surgeons, Glasgow; others from the Apothecaries' Company, London; the Royal College of Surgeons, Edinburgh; the Royal College of Surgeons, Dublin; the Royal College of Surgeons, London; McGill College; University of Paris; University of Edinburgh; University of Maryland; University of Pennsylvania; University of Berlin; and tickets from lectures at Bowdoin College, Dartmouth College, *Fairfield College, University of New York, Berkshire Medical Institution (Massachusetts), Geneva Medical College (New York), University of Glasgow, Borough Hospital (London), Jefferson Medical College, Willoughby University (Ohio), &c., &c.

A University for Upper Canada had been projected as early as 1795. A Charter was obtained from George IV, 15th March, 1827, for the University of King's College, "at or near our Town of York in our said Province of Upper Canada," with power to grant degrees of Master of Arts and any degree in Divinity, Law or Medicine. This Charter was amended by the Provincial

*Fairfield Medical College began in 1809 as an unincorporated institution, known as the Academy of Medicine of Fairfield, at a small village, Fairfield, not far from Little Falls, N.Y. In 1812 it was granted a charter by the State Legislature, under the style "College of Physicians and Surgeons of the Western District of the State of New York," known as Fairfield Medical College. This, it is said, was the sixth medical college organized in the United States. From 1813 to 1839 lectures were given at Fairfield, Frank Hamilton delivering his first course of surgical lectures at its last session. Geneva Medical College, of Geneva, N.Y., had been chartered in 1834, and its first course of lectures was given in 1835. When Fairfield Medical College closed its doors (which it did after the session of 1839-1840) some of its Faculty, including Hamilton, joined the staff at Geneva. This College continued until 1872, when it removed to Syracuse, N.Y., becoming the Medical Faculty (College of Medicine) of the Syracuse University. This is still in active operation, with an attendance of about 150 students.



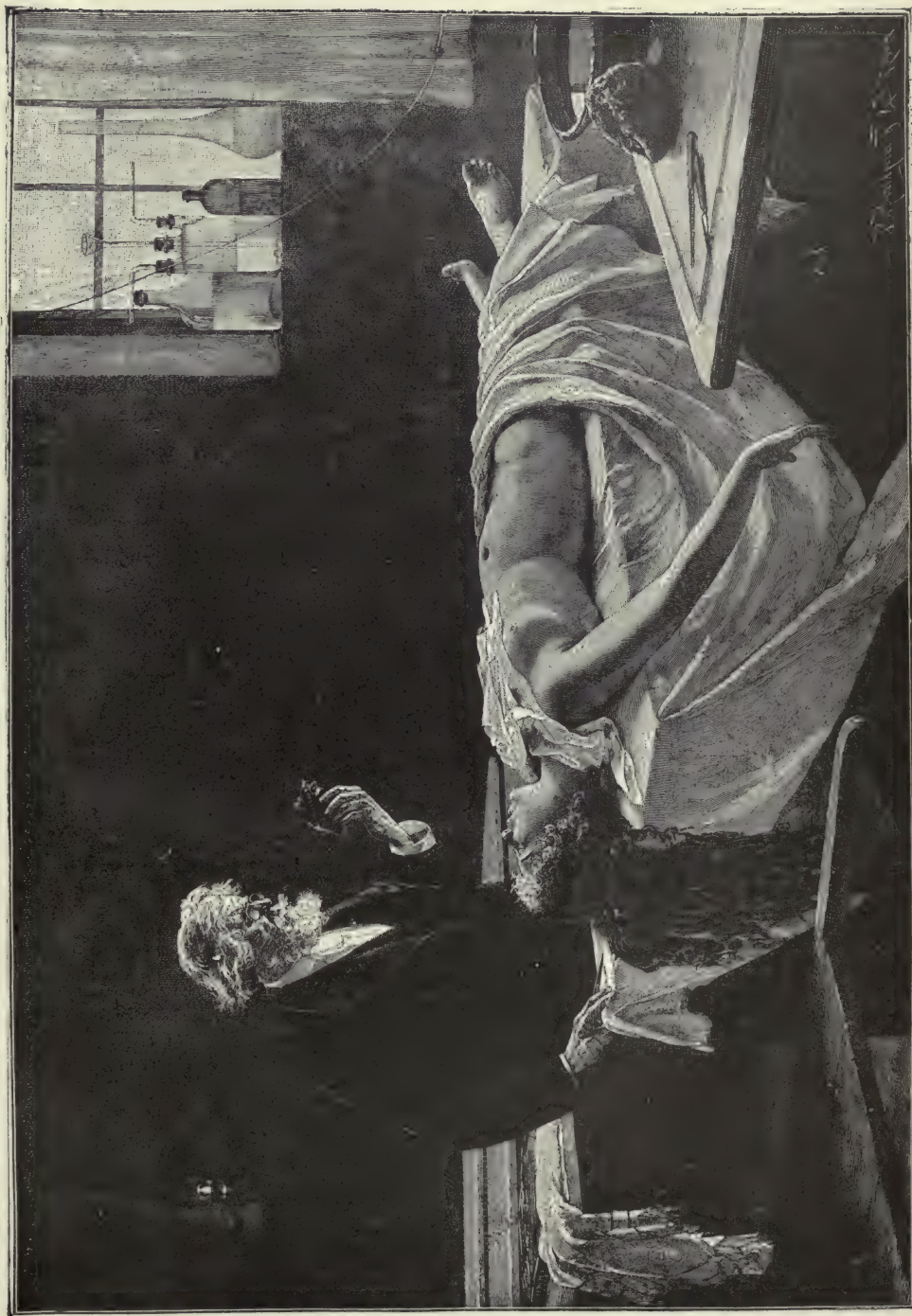
A SPOONFUL EVERY HOUR.

Legislature in 1837, March 4th, by the Act 7, Wm. IV., which annexed Upper Canada College and abolished religious distinctions and tests. The foundation stone was laid April 23rd, 1842, and the University formally opened June 8th, 1843, with (amongst others on the staff on paper) Professors of Chemistry, Anatomy and Physiology, Materia Medica, Obstetrics, Practical Anatomy and Surgery.

Lectures begun in January, 1844, with a staff in fact of six Professors—namely, Professors of Anatomy and Physiology, Theory and Practice of Medicine, Principles and Practice of Surgery, Obstetrics and Diseases of Women and Children, Materia Medica Pharmacy and Botany, and Practical Anatomy respectively. It is interesting to note that Dr. J. H. Richardson, so well known, and whose memory is so dear to many of us, was one of the two matriculated students at that first session. Dr. Richardson had previously studied under Dr. John Rolph in Rochester, N.Y., where this extraordinary man was practising, having been obliged to leave Upper Canada owing to the troubles of 1837. Dr. Rolph came back to Toronto in 1843, and took students who did not intend going to the University, and prepared them for the Medical Board. This resulted in his founding the "Toronto School of Medicine," certainly before 1848, and this school was incorporated in 1851 by Act 14 & 15 Vic., c. 155. No degree-conferring powers were granted, however.

The name of the University was in 1849 changed to the University of Toronto by the "Baldwin Act," 12 Vic., c. 82, and its completely non-denominational character established. In the following year, certain medical men organized another School of Medicine, "The Upper Canada School of Medicine." So that in 1850 there were in Toronto three schools of Medicine—the University Faculty of Medicine, the Toronto School of Medicine (Rolph's School), and the Upper Canada School of Medicine (Hodder's School). This last, during the same or the following year, became the Medical Faculty of the newly established Trinity University; and had its locus on the west side of Spadina Avenue just north of Queen Street.

The Medical Faculty of the University of Toronto did not last long thereafter. The Act of 1853, 16 Vic., c. 89, limited the functions of the University to examination and graduation, and



THE ANATOMIST.

instituted a College—University College—for Arts teaching, providing (Section 32), that after 1st of January, 1854, there should be no Professorship or Teachership of any of the branches of Medicine or Surgery except as part of a general system of liberal education. This provision the political gossip and scandal of the day charged as being due to the influence of Dr. Rolph, whose School was supposed to be suffering from the competition of the State University.

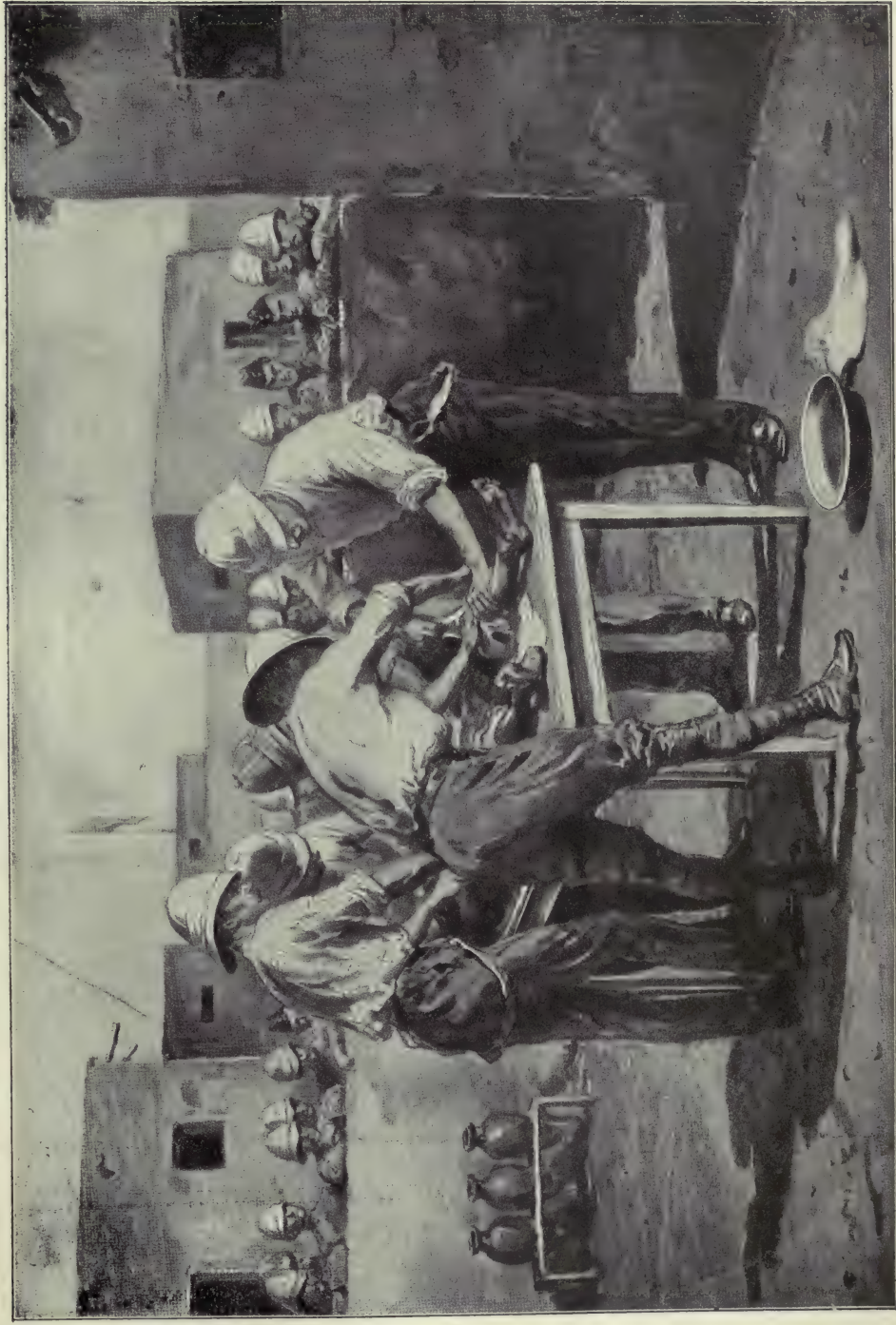
Rolph's School became, in 1855, the Medical Faculty of Victoria University; and having originally been at 53 Queen Street, in 1854 it removed to Richmond St. between Yonge and Bay Sts., and in 1857 went to the new College buildings in Yorkville.

Soon, too, the Trinity Faculty lapsed (that is, in 1856), and advantage was taken of the charter which Dr. Rolph had obtained in 1851, but which was now no longer needed for his school, to organize a new school, in form and name a continuation of the old Toronto School of Medicine. This began operations in 1857 in affiliation with the University of Toronto; and Dr. Hodder soon took its presidency. He resigned this position to become Dean of the new Medical Faculty of Trinity University, which was organized in 1870-1871; but the Toronto School of Medicine continued under Dr. W. T. Aikins as President.

The Victoria Faculty lapsed in 1875; and the Trinity Medical Faculty became a separate body, "Trinity Medical School," by Statute in 1877, 40 Vic., c. 65.

The Ontario Medical College for Women began operations in 1884-1885 in Toronto, and another in Kingston a little later—while the Western University Medical Department at London was in operation by 1882-1883.

In 1887 the Toronto School of Medicine became, in substance, the Medical Faculty of the University of Toronto (though retaining its identity), and in 1903 the two Medical Schools, the Toronto School (then, in fact, the Medical Faculty of the University of Toronto) and the Trinity Medical College or School, became one, and were united as the Medical Faculty of the University of Toronto. The Ontario College for Women continued until 1906. In that year the University Medical Faculty arranged to provide women students with all the facilities enjoyed by men. The *raison d'être* of the College for Women thereupon ceased and that College closed its doors.



ARMY SURGEONS AT WORK IN THE WAR IN THE PHILIPPINES.

The Western University School still is in active operation.

The Medical College at Kingston began as the Medical Faculty of Queen's University.

A University with the name "The University of Kingston," had been incorporated by Provincial Act, 3 Vic., c. 35, in connection with the Church of Scotland, with power to confer degrees in all Faculties. This bill was disallowed by the Home authorities—for what had Presbyterians to do with a University?—but in 1841 the young Queen granted a charter to an institution under the name of "Queen's College at Kingston;" and that body was made the recipient of all the property of "the University at Kingston" by 9 Vic., c. 89.

The Medical Faculty of the new University began lectures in 1854, graduating its first class in 1855. In 1866, however, the Medical Faculty separated from the University, having obtained legislation for that purpose, and the legislature having created a new Corporation, the Royal College of Physicians and Surgeons at Kingston, affiliated with Queen's University. This body again united with the University in 1892 and has since continued a Faculty of the University. The Women's Medical College at Kingston was also merged.

ANATOMY.

In olden times there was no provision for obtaining subjects for dissection, and many were the greswome stories told about "resurrection men," and about doctors and their students robbing new-made graves. Some of these stories had a modicum of truth, but most were sheer fabrications.

In 1843 for the first time the Legislature interfered. The Act 7 Vic., c. 5, recites that it is impossible to acquire a proper or sufficient knowledge of surgery or medicine without a minute and practical acquaintance with the structures and uses of every portion of the human economy, which requires diligently pursued courses of dissection—and then provides that the bodies of those found dead publicly exposed, or who immediately before their death had been supported by or in any public institution, should—unless the person so dying should otherwise direct—be delivered to teachers of anatomy or surgery, either public teachers or private teachers having at least three pupils—and provided that *bona fide* friends or relatives might claim the bodies



THE ANATOMY LESSON.

for interment. An Inspector of Anatomy was to be nominated for every city having a Medical School, who should keep a register of all unclaimed bodies given up for dissection and also of all medical men qualified to receive cadavers for dissection, inspect the dissecting rooms, &c., &c., being paid £1 5s.—\$5—for each body.

In 1863, by 26 Vic., c. 42, patients dying in a provincial lunatic asylum were excepted—they were to be decently interred.

The Act of 1885, 48 Vic., c. 31, gave the relations or *bona fide* friends of the deceased 48 hours to claim the body—and ordered the medical school receiving a body to keep it for five days; and if claimed within the five days it was to be given up. It was also forbidden to send or take any body out of Ontario for anatomical purposes.

In 1889, by 52 Vic., c. 24, the time for friends, &c., to claim a body was reduced to 24 hours—and these are now the provisions of the law. See R. S. O. (1897), c. 177.

The first dissecting room in Toronto seems to have been built in 1843 or 1844 for the Medical Faculty of King's College—and that Faculty first occupied a frame building on the north or west of the west wing of the College building.

HOSPITALS.

There was certainly a Military Hospital at Kingston from the time the British first took possession of that part of Canada. I do not find any record of a hospital in Toronto until about 1812, although no doubt one did exist—in 1819 an advertisement appeared in the official Upper Canada Gazette asking for tenders to build a Brick Hospital in the Town of York—it was erected soon after and acquired some note, the building being occupied for several sessions by the Legislature after the fire of 1824 had destroyed the Parliament Buildings.

In 1830 an Act was passed authorizing a grant of £100 to this Hospital.

In 1830 a public meeting was held at Kingston to build a public hospital, while in 1832 the Medical Board of Upper Canada speaks highly of the Hospital at York (Toronto), and the opportunity it affords medical students of observing diseases and their treatment. In this year the York Dispensary was established, but died in a year for lack of funds.

D^r GUYOTD^r GUYOND^r POTAIND^r PAUL SECOND.

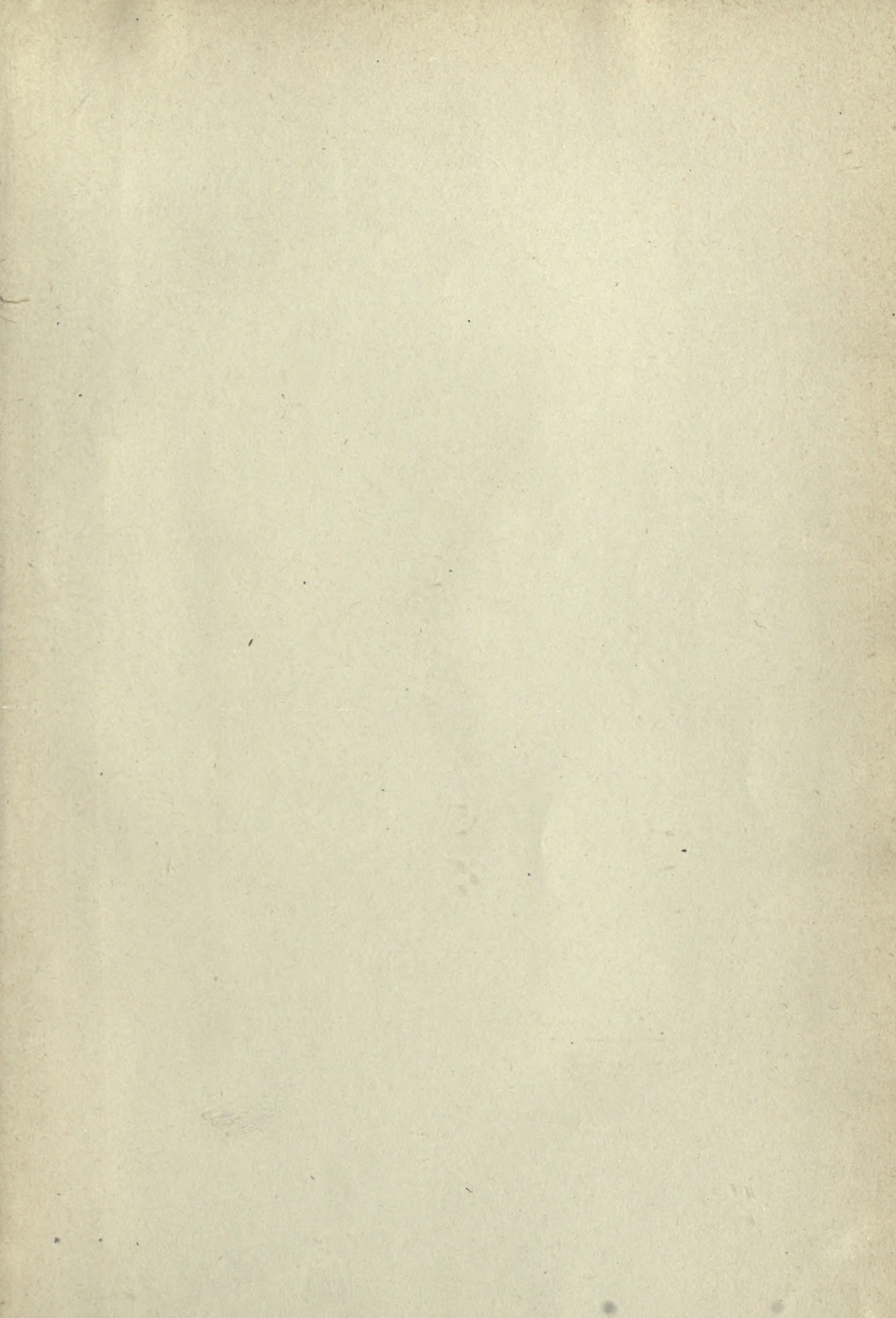
LITHOTRITY

(After the operation)

In 1844 the Board of Trustees of the Toronto Hospital offered the whole of the upper flat of the Hospital to the Medical Faculty of the University, but the terms could not be agreed upon. It then had a whole block of land bounded by King, Adelaide, John and Peter Streets.

By 1850 there were in Toronto not only the Toronto General Hospital, but also the Toronto Eye Infirmary (S. E. corner of Church and King Streets), the Toronto General Dispensary and Lying-in Hospital (established in 1848) and two other Maternity Hospitals.

Ever since the times I have been writing about, the Toronto and Kingston General Hospitals have been utilized by the teachers in the Medical Colleges for clinical instruction. So also in London for the Western University Medical Faculty.



Law
Eng
3543e

136164

Author Riddell William Renwick

Title Essays and addresses vol.3

UNIVERSITY OF TORONTO
LIBRARY

Do not
remove
the card
from this
Pocket.

Acme Library Card Pocket
Under Pat. "Ref. Index File."
Made by LIBRARY BUREAU

